No. 15-8049

IN THE

Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 4, 2016
CERTIORARI GRANTED JUNE 6, 2016

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TABLE OF CONTENTS

Page

RELEVANT DOCKET ENTRIES

Relevant Docket Entries from the U.S. Court of Appeals, Fifth Circuit [No. 14-70030] 1a

Relevant Docket Entries from the District Court for the Southern District of Texas [No. 4:04-cv-03965] 6a

MATERIALS FROM DISTRICT COURT

Defense Exhibit 1 (Dr. Quijano Report Redacted), March 8, 1997 ... . 14a

Defense Exhibit 1a (Dr. Quijano Report Unredacted), March 8, 1997 . .....24a

Transcript of Proceedings, May 1, 1997 (Officer Paul McGinty). . .. .41a

Transcript of Proceedings, May 1, 1997 (Harold Ebnezer) 50a

Transcript of Proceedings, May 1, 1997 (Phyllis Mary Taylor)..... ..... 72a

Transcript of Proceedings, May 2, 1997 (Phyllis Mary Taylor) .. .. .88a

Transcript of Proceedings, May 2, 1997 (Devon Green). 93a

Table of Contents

Page

Transcript of Proceedings, May 2, 1997 (Shennel Gardner) 109a

Transcript of Proceedings, May 2, 1997 (Marilyn Murr) 119a

Transcript of Proceedings, May 6, 1997 (Vivian Jackson) 124a

Transcript of Proceedings, May 6, 1997 (Deputy D. R. Warren) 130a

Transcript of Proceedings, May 6, 1997 (Dr. Walter Quijano and Closing Statements) 137a

All Jury Notes, May 6-7, 1997 . . . 207a

Press Release, Office of the Texas Attorney General, U.S. Supreme Court Grants State's Motion in Capital Case, June 5, 2000. 211a

Press Releases, Office of the Texas Attorney General, Statement from Attorney General John Cornyn Regarding Death Penalty Cases, June 9, 2000 . . . . 213a

Memorandum and Order from the District Court for the Southern District of Texas (Houston Division) Granting Respondent's Motion for Summary Judgment and Denying Petitioner's Writ of Habeas Corpus, July 24, 2006. 219a

Table of Contents

Page

Memorandum and Order from the District Court for the Southern District of Texas (Houston Division) Denying Petitioner's Motion for Relief from Judgment pursuant to FRCP 60(b)(6), August 29, 2014. . . . . .249a

Opinion of the District Court for the Southern District of Texas (Houston Division) Denying Petitioner's Motion to Alter or Amend Judgment pursuant to FRCP 59(e), March 11, 2015 .269a

MATERIALS FROM CIRCUIT COURT

Opinion of the Fifth Circuit re: Petitioner's Motion for a Certificate of Appealability, August 20, 2015. . . .274a

Opinion of the Fifth Circuit *en banc* re: Petitioner's Motion for a Certificate of Appealability, November 6, 2015 288a

MATERIAL FROM SUPREME COURT

Saldaño v. Texas: Respondent's Brief in Opposition to Petition for Writ of Certiorari, No 99-8119. . . . .295a

RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT [NO. 14-70030]

Date Filed	Docket Text
09/29/2014	DEATH PENALTY CASE docketed. NOA filed by Appellant Mr. Duane Edward Buck [14-70030] (MRW)
	* * *
05/11/2015	CORRECTED MOTION for certificate of appealability [7910348-2]. Motion due deadline satisfied.. Response/Opposition due on 06/10/2015. [14-70030]
	REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: MOTION filed by Appellant Mr. Duane Edward Buck for certificate of appealability [7910348-2]. Date of service: 05/11/2015 via email - Attorney for Appellants: Black, Spital, Swarns; Attorney for Appellee: Sargent [14-70030] (Christina A. Swarns)
05/11/2015	BRIEF IN SUPPORT filed by Appellant Mr. Duane Edward Buck in support of motion for certificate of appealability [7910348-2] (INCORPORATED IN

MOTION FOR COA) Brief in Support deadline satisfied. [7910507-1] [14-70030] (MFY)

* * *

06/10/2015 RESPONSE/OPPOSITION [7933991-1] to the motion for certificate of appealability filed by Appellant Mr. Duane Edward Buck in 14-70030 [7910348-2]Response/Opposition deadline satisfied. [14-70030]

REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: RESPONSE/ OPPOSITION filed by Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division [7933991-1] to the motion for certificate of appealability filed by Appellant Mr. Duane Edward Buck in 14-70030 [7910348-2] Date of Service: 06/10/2015 via email - Attorney for Appellants: Black, Spital, Swarns; Attorney for Appellee: Sargent. [14-70030] (Fredericka Searle Sargent)

06/24/2015 DOCUMENT RECEIVED - NO ACTION TAKEN No action will be taken at this time on the reply to response/opposition to motion for

	certificate of appealability received from Appellant Mr. Duane Edward Buck because leave of the court is required [14-70030] (MRW)
06/25/2015	UNOPPOSED MOTION filed by Appellant Mr. Duane Edward Buck for leave to file a reply [7946888-2] to the response/opposition filed by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division in 14-70030 [7933991-2], motion for certificate of appealability filed by Appellant Mr. Duane Edward Buck in 14-70030 [7910348-2]. Date of service: 06/25/2015 via email Attorney for Appellants: Black, Spital, Swarns; Attorney for Appellee: Sargent [14-70030] (Christina A. Swarns)
06/26/2015	COURT ORDER granting motion for leave to file a reply filed by Appellant Mr. Duane Edward Buck [7946888-2] [14-70030] (MRW)
06/26/2015	REPLY filed by Appellant Mr. Duane Edward Buck [7947570-1] to the response/opposition filed by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division in

	14-70030 [7933991-2], to the motion for certificate of appealability filed by Appellant Mr. Duane Edward Buck in 14-70030 [7910348-2]. [14-70030] (MRW)
08/20/2015	UNPUBLISHED OPINION ORDER FILED. [14-70030 Affirmed] Judge: JES , Judge: PRO , Judge: CH; denying motion for certificate of appealability filed by Appellant Mr. Duane Edward Buck (ISSUED AS AND FOR THE MANDATE) [7910348-2] [14-70030] (JRS)
08/20/2015	MANDATE ISSUED. [14-70030] (JRS)
	* * *
09/11/2015	PETITION filed by Appellant Mr. Duane Edward Buck for rehearing en banc [8009756-2]. Date of Service: 09/11/2015 via email - Attorney for Appellants: Black, Spital, Swarns; Attorney for Appellee: Sargent [14-70030] (Christina A. Swarns)
	* * *
10/09/2015	RESPONSE/OPPOSITION [8031002-1] to the petition for rehearing en banc

filed by Appellant Mr. Duane Edward Buck in 14-70030 [8009756-2], court order Court directive requesting a response [8021783-2]Response/ Opposition deadline satisfied. [14-70030]

REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: RESPONSE/ OPPOSITION filed by Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division [8031002-1] to the petition for rehearing en banc filed by Appellant Mr. Duane Edward Buck in 14-70030 [8009756-2] Date of Service: 10/09/2015 via email - Attorney for Appellants: Black, Spital, Swarns; Attorney for Appellee: Sargent. [14-70030] (Fredericka Searle Sargent)

11/06/2015 COURT ORDER denying petition for rehearing en banc filed by Appellant Mr. Duane Edward Buck [8009756-2] With Poll.; Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is denied [8053446-1] JLD, Circuit Judge, with whom JEG, joins, dissenting [14-70030] (JMA)

* * * *

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
[NO. 4:04-CV-03965]

Date Filed	#	Docket Text
10/14/2004	1	PETITION for Writ of Habeas Corpus (Filing fee $ 0.) filed by Duane Edward Buck.(mholland,) Additional attachment(s) added on 10/14/2004 (mholland,). (Main Document 1 replaced on 3/27/2015) (rwestmoreland, 4). (Entered: 10/14/2004)
		* * *
09/06/2005	6	ANSWER to Petition for Writ of Habeas Corpus by Douglas Dretke, filed.(Stewart-Klein, Ellen) (Entered: 09/06/2005)
09/06/2005	7	MOTION for Summary Judgment by Douglas Dretke, filed. Motion Docket Date 9/26/2005. This entry is attached to the same document as 6 and was made for case management purposes. (ltien,) (Entered: 09/09/2005)
		* * *

01/06/2006	11	RESPONSE to 7 MOTION for Summary Judgment, filed by Duane Edward Buck. (dhansen) (Entered: 01/09/2006)
01/26/2006	12	REPLY to Response to 7 Motion for Summary Judgment, filed by Douglas Dretke. (Stewart-Klein, Ellen) Modified on 2/8/2006 - linked to #7 (ltien,). (Entered: 01/26/2006)

* * *

07/24/2006	15	MEMORANDUM AND ORDER granting 7 MOTION for Summary Judgment. Petitioner's Petition for Writ of Habeas Corpus is denied. No Certificate of Appealability shall issue. (Signed by Judge Vanessa D Gilmore) Parties notified.(kmurphy,) (Entered: 07/26/2006)
07/24/2006	16	FINAL JUDGMENT. Case terminated on 07/24/06.(Signed by Judge Vanessa D Gilmore) Parties notified.(kmurphy,) (Entered: 07/26/2006)
08/03/2006	17	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 16 Final Judgment by Duane Edward Buck (Filing fee $ 455), filed. (jbradford,) (Entered: 08/03/2006)

* * *

10/01/2009	25	Per Curiam of USCA for the Fifth Circuit (certified copy) dated 9/25/2009 re: 17 Notice of Appeal ; USCA No. 06-70035. Petition for a Certificate of Appealability Denied, filed.(hler,) (Entered: 10/02/2009)
04/30/2010	26	The petition for a writ of certiorari filed with the Supreme Court has been denied (USCA No. 06-70035) (USSC No. 09-8589), filed. (chorace) (Entered: 05/05/2010)
09/07/2011	27	MOTION for Relief from Judgment by Duane Edward Buck, filed. Motion Docket Date 9/28/2011. (Attachments: # 1 Exhibit 01, # 2 Exhibit 02, # 3 Exhibit 03, # 4 Exhibit 04, # 5 Exhibit 05, # 6 Exhibit 06, # 7 Exhibit 07, # 8 Exhibit 08, # 9 Exhibit 09, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Proposed Order)(Dow, David) (Entered: 09/07/2011)
09/07/2011	28	MOTION to Stay *Execution* by Duane Edward Buck, filed. Motion Docket Date 9/28/2011. (Attachments: # 1 Exhibit 01, # 2 Exhibit 02, # 3 Proposed Order) (Dow, David) (Entered: 09/07/2011)

* * *

09/09/2011	30	RESPONSE in Opposition to 27 MOTION for Relief from Judgment, 28 MOTION to Stay *Execution*, filed by Douglas Dretke. (Attachments: # 1 Proposed Order)(Oden, Georgette) (Entered: 09/09/2011)
09/09/2011	31	ORDER denying 27 Motion for Relief from Judgment; denying 28 Motion to Stay. (Signed by Judge Vanessa D Gilmore) Parties notified.(emares,) (Entered: 09/09/2011)

* * *

09/12/2011	33	MOTION to Alter Judgment by Duane Edward Buck, filed. Motion Docket Date 10/3/2011. (Attachments: # 1 Exhibit 01, # 2 Exhibit 02, # 3 Exhibit 03, # 4 Exhibit 04, # 5 Proposed Order)(Black, Katherine) (Entered: 09/12/2011)

* * *

09/12/2011	36	ORDER denying 33 Motion to Alter Judgment; denying 34 Motion for Sanctions; no certificate of appealability shall be issue.(Signed by Judge Vanessa D Gilmore) Parties notified.(emares,) (Entered: 09/12/2011)

09/13/2011	37	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 31 Order on Motion for Relief from Judgment, Order on Motion to Stay by Duane Edward Buck, filed.(Black, Katherine) (Entered: 09/13/2011)

* * *

09/20/2011	42	Per Curiam of USCA re: 37 Notice of Appeal ; USCA No. 11-70025; Buck's application for COA as to his contention that reasonable jurists could debate the district court's disposition of his motion to reconsider judgment is denied. We deny the request for stay of execution, filed. (jhancock) (Entered: 09/21/2011)
11/14/2011	43	The petition for a writ of certiorari filed with the Supreme Court has been denied (USCA No. 11-70025) (USSC No. 11-6391), filed. (Attachments: # 1 Letter)(mmapps,) (Entered: 11/14/2011)

* * *

01/07/2014	49	MOTION for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) by Duane Edward Buck, filed. Motion Docket Date 1/28/2014. (Attachments: # 1 Exhibits, # 2 Proposed Order)(bthomas, 4) (Entered: 01/09/2014)

* * *

04/10/2014	58	RESPONSE to 49 MOTION for Relief from Judgment filed by Rick Thaler. (Sargent, Fredericka) (Entered: 04/10/2014)
04/10/2014	59	Amended RESPONSE to 49 MOTION for Relief from Judgment filed by Rick Thaler. (Sargent, Fredericka) (Entered: 04/10/2014)

* * *

05/21/2014	64	REPLY to Response to 49 MOTION for Relief from Judgment, filed by Duane Edward Buck. (Swarns, Christina) (Entered: 05/21/2014)

* * *

08/29/2014	66	ORDER denying 49 Motion for Relief from Judgment. It is further ordered that no certificate of appealability shall issue. (Signed by Judge Vanessa D Gilmore) Parties notified.(bthomas, 4) (Entered: 08/29/2014)
09/26/2014	67	MOTION to Alter Judgment by Duane Edward Buck, filed. Motion Docket Date 10/17/2014. (Attachments: # 1 Proposed Order)(Swarns, Christina) (Entered: 09/26/2014)

* * *

09/26/2014	69	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 66 Order on Motion for Relief from Judgment by Duane Edward Buck, filed.(Swarns, Christina) (Entered: 09/26/2014)

* * *

10/15/2014	71	RESPONSE in Opposition to 67 MOTION to Alter Judgment, 68 MOTION for Oral Argument on Mr. Buck's Motion to Alter or Amend this Court's Memorandum and Order Denying Duane Buck's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6). Hearing re: 67 MOTION to, filed by William Stephens. (Sargent, Fredericka) (Entered: 10/15/2014)

* * *

10/20/2014	73	REPLY to 71 Response in Opposition to Motion, *PETITIONER'S REPLY TO RESPONDENT STEPHENS'S RESPONSE TO BUCK'S MOTION TO ALTER OR AMEND THIS COURT'S MEMORANDUM AND ORDER DENYING HIS MOTION*

FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6) AND MOTION FOR ORAL ARGUMENT, filed by Duane Edward Buck. (Swarns, Christina) (Entered: 10/20/2014)

* * *

03/11/2015 75 ORDER denying 67 Motion to Alter Judgment. No certificate of appealability shall issue. (Signed by Judge Vanessa D Gilmore) Parties notified.(amwilliams, 4) (Entered: 03/11/2015)

* * *

04/08/2015 78 Amended NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 75 Order on Motion to Alter Judgment, 66 Order on Motion for Relief from Judgment by Duane Edward Buck, filed. (Black, Katherine) Modified on 4/9/2015 (bcampos, 1). (Entered: 04/08/2015)

* * * *

DEFENSE EXHIBIT 1 (DR. QUIJANO REPORT REDACTED), MARCH 8, 1997

DEFENSE EXHIBIT NO. 1
FORENSIC PSYCHOLOGICAL EVALUATION
[EXHIBIT MARKER OMITTED]

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Walter Y. Quijano, Ph. D.
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FORENSIC PSYCHOLOGICAL EVALUATION

NAME: Duane E. Buck DATE: 8 March 1997

INTRODUCTION:

Duane, a 33-year-old widowed Black male with a high school education and auto mechanics work background, was referred for a forensic psychological evaluation by his counsel, Danny Easterling, Esq. to assist in his defense. The defendant was charged with capital murder (Cause No. 699684 in the 208th Judicial District of Harris County, Texas).

He was advised that this report was to be submitted to his counsel and that he had the right not to participate

in the examination and to terminate the examination at any point he wanted to. He knew of and anticipated the examination.

The information used in this report was gathered for the avowed purpose of assisting in his own defense and should not be used as the basis for determining guilt or innocence.

PROCEDURES:

1. Clinical interview with defendant on 2/14/97
2. Millon Clinical Multiaxial Inventory-II (MCMI-II)
3. Review of defense lawyer's notes on witnesses' statements.

FINDINGS:

Behavioral Observations/Mental Status. The defendant was examined at the Harris County Jail. He was appropriately dressed and groomed. Gait was normal. No unusual gestures were observed. Voice was appropriate for the situation. The defendant was friendly and cooperative.

he was generally oriented to time,
Speech was reactive and expressive and contained no association, delusion, or hallucination disorders. Memory was intact by interview and fair by self-report. No memory problems were reported. Abstract thinking was normal by interview in that he was able to conduct a meaningful conversation. Attention and concentration were normal,

The defendant's mood and affect were normal.

Vegetative signs were reviewed. He sleeps in peace because of the love of Jesus. His appetite is fair; he fasts for his spiritual growth. Energy level is normal.

History. The defendant attended school through the 12th grade, and completed a trade school curriculum in paint and body automobile repair. He also studied auto mechanics in TDCJ-ID. He has worked with his father in auto mechanics and used parts "all my life."

The defendant has had two common law marriages. The first marriage from 1984 till 1989 produced a son, now nine.

He and former wife continue to be friends. His second marriage from 1991 till 1995 was with the now deceased complainant. They had no children.

MCMI-II. The Personality code was: 8B 312 ** - * 8A + 7 4 6A ' // S ** - * //. The Syndrome code was: B D ** A * // - ** CC *. The test was valid, though he appeared to have magnified the level of experienced illness. Suggested Axis I impressions were:

296.33 Major depression, recurrent, severe without psychotic features
305.00 Alcohol abuse
300.02 Generalized anxiety disorder.

Suggested Axis II impression was a configuration of:

301.22 Schizotypal personality disorder

301.90 Personality disorder NOS (Self-defeating)
301.60 Dependent personality disorder.

CLINICAL IMPRESSION:

Axis I - 303.90 Alcohol dependence, in remission by incarceration
304.20 Cocaine dependence, in full remission by report
Axis II - 301.60 Dependent personality features

Axis III - None reported

Axis IV - Psychosocial stressors: incarceration, pending capital murder charge

Axis V Global Assessment of Functioning: 60 GAF before jail: 50

CLINICAL RECOMMENDATIONS:

1. Substance abuse treatment program:

A. If released to community:

1) Relapse prevention groups: 48 weekly sessions and then aftercare.
2) Supervised antagonist therapies: Antabuse for alcohol and Naltroxene for cocaine.
3) Random urinalysis at least twice a month.

B. If incarcerated, participate in an in-house substance abuse program.

2. Individual therapy to identify Dependent personality disorder features that may have contributed to the conduct charged and modify them.

FORENSIC RECOMMENDATIONS:

1. Encourage the defendant to recall the remainder of what he did upon his second return to the house, when he was accused of fatally shooting his girlfriend and a male companion, and shooting his sister. The claim of sudden onset of amnesia just prior to the shootings, after a detailed recollection of the rest of the events, is not credible and not psychological supportable.

2. Future Dangerousness, Whether there is probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? The following factors were considered in answer to the question of future dangerousness: statistical, environmental, and clinical judgment.

I. STATISTICAL FACTORS

1. **Past crimes.** Non-contributory. His past offenses were non-violent drug offenses.

2. **Age.** Decreased probability. He is now 33; street crimes are of lesser probability with this age group and older.

3. **Sex.** Increased probability. Males are more violent than females as a group.

4. **Race.** Black: Increased probability. There is an over-representation of Blacks among the violent offenders.

5. **Socioeconomics.** Stable by self-report: Decreased probability. Unstable by a witness' report: increased probability.

6. **Employment stability.** Stable by self-report: Decreased probability. Unstable by a witness' report: increased probability.

7. **Substance abuse.** Yes for alcohol at the time of the conduct charged, and cocaine by history: Increased probability.

II. ENVIRONMENTAL FACTORS

1. **Family environment.** No exposure to family abuse/violence: Decreased probability.

2. **Peer environment.** Did not Associate with peers that encouraged assaultive crimes: Decreased probability.

3. **Job Environment.** Past jobs were not conducive to violence: Decreased probability.

4. **Availability of victims.** Narrow victim pool: Decreased probability. This appears to be "family" type violence with a conjugal jealousy precipitated by a perception of wife's infidelity; the victims were not randomly picked. Non-random victimizers are less dangerous than random victimizers.

5. **Availability of weapons.** Yes: Increased probability.

6. **Availability of drugs.** Yes: Increased probability.

III. CLINICAL JUDGMENT FACTORS

1. **Mental illness.** There is no history of thinking disorder that is associated with assaultiveness. This factor is considered to reduce dangerousness.

2. **Anti-social personality disorder.** The defendant does not meet the criteria of anti-social personality disorder, though he has antisocial features. This factor argues for less probability for continuing violent threat to society.

3. **Specificity of the situation that induced the conducts** charged. **This appears to be a family type violence, influenced by** conjugal jealousy precipitated by his perception of wife's infidelity. This factor argues for less probability for continuing violent threat to society.

4. **Deliberateness.** Insufficient data from self-report. He does not remember shooting the victims, though he admitted to police he did the shootings at the time of his arrest. He appeared to be deliberate from witnesses' statements showing he returned a second time with a gun, forced himself into the house, and ignored pleadings not to shoot: Increased probability.

5. **Remorse**. He does not remember shooting the victim, though he admitted to the police he did the shootings at the time of his arrest: Increased probability.

6. **Post-conducts charged behaviors.**

a. Continuing crimes. None of the versions showed continuing crimes after the conduct charged since he was promptly arrested. This factor is not applicable as he did not have the opportunity to commit more crimes.

b. Fun:

This factor argues for more probability for continuing violent threat to society.

c. Surrender. He peacefully cooperated with his arrest, though the police had a gun pointed at him at the time of arrest. This factor argues for less probability for continuing violent threat to society.

7. **Personal factors that contributed to the conducts** charged. **There were personal factors reportedly operating at the** time of the conduct charged that may have made the conduct charged specific and limited to this offense circumstance, such that repetition of the offense in the future is unlikely. The apparent motivation was conjugal jealousy precipitated by his perception of his wife's infidelity. This factor argues for less probability for continuing violent threat to society.

9. **Environmental factors that contributed to the conducts** charged. **There were environmental factors reportedly operating at** the time of the conducts charged that may have made the conducts specific and limited to this offense circumstance, such that repetition of the

offense in the future is unlikely, i.e., The presence of individuals that he perceived as participants in the wife's infidelity. He did not hurt the children. This factor argues for less probability for continuing violent threat to society.

10. **Effect of prolonged incarceration.** The defendant is of course less likely to be dangerous while incarcerated. The effect of prolonged incarceration (e.g., aging) in conjunction with physical restraints (e.g., security level and housing), rehabilitative efforts (e.g., education, substance abuse, punishment, psychiatric services) needs to be estimated. The prison system has enough resources to subdue what level of dangerousness he may bring with him: classification/security level system, housing restraints (administrative segregation and super segregation), supervision, crisis intervention (major use of force techniques), and psychiatric medication intervention.

His behavior record in jail and in previous prison stays may be used as a sign that he may do well in prison. He reported no assaults while in incarceration; he worked and attended school. Furthermore, lifers in the prison system tend to do well and better than short termers. The conditions, e.g., more space, less in-cell time, more out-of-cell activities, in prison is less conducive to acting out.

Overall, it appears that, without intervention, the defendant is more likely than not to constitute a continuing violent threat to society. However, if given life instead of death, the prison system has enough resources to safely incarcerate him. Additionally, the factors that can be manipulated and presently contribute to dangerousness can be controlled in prison.

Employment and financial instability is no longer a factor in prison. It is more difficult to gain access to drugs and alcohol and weapons in prison. His victim pool, already narrow in the instant offense because of its family violence features, becomes narrower in prison; furthermore, the prospective victims in prison are less naive in that they are aware of their environment and take the necessary precautions to minimize victimization. The dependent husband/wife relationship, that contributed to the conduct charged, is gone.

Thank you for consulting me on this difficult but interesting case. Please feel free to contact me if you have any questions.

/s/ Walter Y. Quijano
Walter Y. Quijano, Ph.D., P.C.
Clinical Psychologist.

DEFENSE EXHIBIT 1A (DR. QUIJANO REPORT UNREDACTED), MARCH 8, 1997

DEFENDANT'S EXHIBIT NO. 1(A)

FORENSIC PSYCHOLOGICAL EXAMINATION

FORENSIC PSYCHOLOGICAL SERVICES
psychological consultations in the practice of law

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FORENSIC PSYCHOLOGICAL EVALUATION

NAME: Duane E. Buck DATE: 8 March 1997

INTRODUCTION:

Duane, a 33-year-old widowed Black male with a high school education and auto mechanics work background, was referred for a forensic psychological evaluation by his counsel, Danny Easterling, Esq. to assist in his defense. The defendant was charged with capital murder (Cause No. 699684 in the 208th Judicial District of Harris County, Texas). The defense lawyer wrote in his 1/13/97 letter to this psychologist that the defendant is "alleged to have shot and killed his ex-girlfriend and a male companion as well as shooting his half sister in the same criminal transaction ..."

He was advised that this report was to be submitted to his counsel and that he had the right not to participate in the examination and to terminate the examination at any point he wanted to. He knew of and anticipated the examination.

The information used in this report was gathered for the avowed purpose of assisting in his own defense and should not be used as the basis for determining guilt or innocence.

PROCEDURES:

1. Clinical interview with defendant on 2/14/97
2. Millon Clinical Multiaxial Inventory-II (MCMI-II)
3. Review of defense lawyer's notes on witnesses' statements.

FINDINGS:

Behavioral Observations/Mental Status. The defendant was examined at the Harris County Jail. He was appropriately dressed and groomed. Gait was normal. No unusual gestures were observed. Voice was appropriate for the situation. The defendant was friendly and cooperative.

The defendant was oriented to person, place, and situation. He initially said he did not know the date because he has been in jail since July 1995, but when pressed he was generally oriented to time, thinking it was Friday 2/13/97 instead of 2/14/97. Speech was reactive and expressive and contained no association, delusion, or hallucination disorders. Memory was intact by interview

and fair by self-report. No memory problems were reported. Abstract thinking was normal by interview in that he was able to conduct a meaningful conversation. Attention and concentration were normal by interview and fair by self-report. Asked if he has noticed anything wrong with his thinking, he stated that he used to have suicide thoughts, and that he thinks about the drunk driver that killed his mom when he was 12, and about his favorite dog that was run over when he was 10 or 11. Insight was mixed; good in that he realized his legal predicament, and poor in his claim of amnesia of the shootings he is accused of. Furthermore, he enumerated examples of depressive episodes including his parents' divorce, his mom's and dog's deaths, and his past drinking and drugging, but did not include the death of Debra Gardner, who he considered to be his common-law wife. Judgment was poor. The defendant appeared to be of questionable reliability as an informant.

The defendant's mood and affect were normal. Asked about his mood, he stated he "wanted my own and be in peace, but the devil does not want you to be in peace". Asked again about his mood, he said he was happy because "Jesus is in my life". Asked about any depressive episodes, he stated that he was depressed over his parents' divorce, his dog's death, and his mom's death. He also was depressed when he was drinking and drugging in the 80's because he was not satisfied with his frame of mind. He reported that he discontinued substance abuse, but engaged in gambling and in the accumulation of material things, which was also depressing to him. He described himself as good tempered and self-controlled when he

is not substance abusing. He reported no dysfunctions related to his temper.

Vegetative signs were reviewed. He sleeps in peace because of the love of Jesus. His appetite is fair; he fasts for his spiritual growth. Energy level is normal. Asked about his sex drive, he stated he did not have any as "part of self-control". Active suicide ideation was denied.

History. The defendant attended school through the 12th grade, and completed a trade school curriculum in paint and body automobile repair. He also studied auto mechanics in TDCJ-ID. He has worked with his father in auto mechanics and used parts "all my life' He stated that he "worked all the time" He described his father as fair and supportive, and stated that he believed anyone who accepted Christ is now his real family.

The defendant has had two common law marriages. The first marriage from 1984 till 1989 produced a son, now nine. He described the marriage as a beautiful relationship, but they separated because substance abuse led to physical confrontation, and it was time to separate. He and former wife continue to be friends. His second marriage from 1991 till 1995 was with the now deceased complainant. They had no children.

The defendant's medical history was noncontributory. He has no history of psychological treatment. The defendant stated he was raised by an alcoholic grandfather, and began drinking at age seven or eight. His last drinking episode was on the day of the instant conduct charged

when he was drunk, having drank some liquor with friends and a six pack of beer by himself. He considered his alcohol use abusive through the 1980's. He abstained from alcohol between 1988 and 1989, but resumed drinking again in the early 1990's, quitting in 1994. He remained abstinent until one or two weeks before the instant conduct charged. He also admitted to powder and crack cocaine abuse in 1988 and between 1992 and 1993.

Criminal history was reviewed. In 1989 the defendant was convicted of Possession of cocaine, and was sentenced to three years in TDCJ-ID, though he served in jail. In 1990 he was convicted of Delivery of cocaine, and served one year of a ten year sentence in TDCJ-ID. While in prison, he did well with no assaults and no trouble; he worked and attended auto mechanics school. He served another year of jail time for a parole violation, missing three sessions of substance abuse treatment. He was on parole at the time of his arrest.

MCMI-II. The Personality code was: 8B 3 1 2 ** - * 8A +7 4 6A ' // S ** * //. The Syndrome code was: B D ** A * // - ** CC * The test was valid, though he appeared to have magnified the level of experienced illness. Suggested Axis I impressions were:

296.33	Major depression, recurrent, severe without psychotic features
305.00	Alcohol abuse
300.02	Generalized anxiety disorder.

Suggested Axis II impression was a configuration of:

301.22 Schizotypal personality disorder
301.90 Personality disorder NOS (Self-defeating)
301.60 Dependent personality disorder.

Conduct Charged. The defendant said he is charged with Capital murder, shooting and killing his common-law wife and a male companion, and shooting but not killing his half-sister.

The defendant described the conduct charged as follows:

> The defendant was working in his father's business. His wife (Debra) stopped him, along with his uncle John, who was driving his truck. She had come to deliver a change of clothes for the defendant. He bought her gasoline at her request. She told him she loved him and kissed him. The defendant told her he had a bad dream in which something bad happened to her. She said, "I'm all right," and left, supposedly to return to work at her father's business and later to pick up his sister, Phyllis.
>
> He went back to the shop and drank beer and liquor until 10:00 PM. He and his uncle went to shoot pool. They left at 3:00 AM. His uncle dropped him off at his father's house, and he drove home to his wife. He knocked on the front door, but nobody answered. He peeped over the

fence and saw a man on the living room couch. He knocked harder, and when no one answered, he forced the door open and went in. He met his sister, Phyllis, and nobody else, and so he went to the bedroom and saw two men in the bedroom. He and his wife began arguing, and they slapped each other. One of the men held him back and they exchanged words.

The defendant wanted to leave, and packed clothes for himself and his son. The exchange of words with the man continued. The defendant got his tools from the trunk of the wife's car and put them in his truck. He reached out to his wife standing by the door to give her the keys to the car, but she avoided him. She got a knife, and the defendant told her to stab him in the back. The man took the knife from her. The defendant took six to seven beers from the refrigerator and drove off. He ran out of gas by the George R. Brown Convention Center, and had to walk to a service station. While there, he called the house and asked his sister, "Why are you doing this to me?", and asked more questions. He drove to his dad's house, and then returned to his house. He stated that he remembered nothing else from this point on until he was in jail.

In response to questions, the defendant stated that when he first returned to the house, he felt that everything was falling apart. He felt deceived, and as if someone had

stabbed his heart. He was very confused and hurt, and felt like he could just die.

When he left the house after arguments with wife and one of the men, he just wanted to get away because he was very confused; he had suicide ideation. He stated that when he ran out of gas, "dark came over me"; he felt like he was headed toward a cliff without brakes; he was scared and hurt, and he wanted to jump off the freeway. He was in tears.

When he called his sister, he felt "different" from previous wife's infidelities, and just needed to talk to somebody. The conversation did not go well, and he felt he got no answers.

Upon his second return to his house, when the shootings allegedly happened, he stated that he does not remember how he felt. He stated that he and his wife were not separated; he was not living at his dad's house.

Notes of the defense lawyer of witnesses' statements were reviewed. Deputy P. E. McGinty reported that when he arrived at the crime scene on 7/30/95, Harold Ebnezer pointed to the defendant as the shooter of Debra Gardner, Kenneth Butler, and Phyllis Taylor, killing Debra and Kenneth and wounding Phyllis. The defendant admitted to Deputy McGinty that he shot Debra Gardner, and was arrested. Harold Ebnezer told the Deputy that the defendant came at 3:00 or 4:00 AM that morning, and the police was called. The defendant returned at about 7:24 AM with a shot gun and kicked the door in. The defendant

shot at Harold Ebnezer but missed. Harold Ebnezer and Debra Gardner ran out the sliding door, and Harold Ebnezer heard more gun shots inside. Harold Ebnezer jumped the fence and got on the road. Debra Gardner was at this time on the road too and the defendant came out and shot her. The defendant went to a white Jaguar. At 9:15 AM Deputy J. Payne noted that the defendant wanted to use the restroom and said "I fucked up! I shot my sister!" A 22 rifle was found in the trunk of the Jaguar.

Kanetta J. Gardner, a niece of Debra Gardner, reported that the defendant used to date her aunt Debra and was angry at her upon his forced entry for having another man in the house. The defendant hit Debra in the face with his fist in the bedroom. Later that morning, upon hearing gunshots, Kanetta came out of her room and saw Kenny laying on the hallway floor and in the living room saw the defendant laid a gun on the floor while holding another gun. She followed the defendant outside the house and saw him shoot Debra in the street. He retrieved the gun inside the house and put both guns in the trunk of the car.

Shennel L. Gardner, a child of Debra Gardner, reported that her mother Debra had been seeing the defendant for five years. After getting out of jail on 5/95, he stayed with them but Debra got sick of him laying around and not wanting to work. He left and did not come around for two weeks, and Debra started seeing Kenneth Butler. Shennel said the defendant hit Debra in the eye and poured beer on her and left, which Debra reported to the police. Early the next morning after being awakened

by a lot of commotion, Shennel saw Kenneth bleeding on the hall floor and Phyllis in the living room holding her chest and calling the police. Shennel ran outside and saw Debra unsuccessfully trying to stop a car, and the defendant chased Debra and shot her. During the bond hearing, Shennel testified that she was beating on the defendant's back, telling him not to shoot her mother, but he shot her anyway.

Harold W. Ebnezer, a brother of Kenneth Butler, who knew Debra for about six or seven years, reported that Kenneth started dating Debra two days prior. He reported that the defendant forced himself into the house earlier in the evening after Debra refused to answer the door, and started to beat on Debra. Harold and Kenneth put themselves between Debra and the defendant, who picked a fight with Kenneth by inviting him to take care of it outside; he added that he wanted to go back to the penitentiary. Arguments continued for about 30 to 45 minutes, and the defendant called Debra a whore, bitch, and other names. Upon the defendant's second forced entry, he had a shotgun and shot at Harold but missed. Harold ran and told Kenneth in the bedroom that the defendant had a gun, and Kenneth got out of bed and went to the hallway and the shooting started. Harold and Debra went out the bedroom patio door and jumped the fence, and Harold heard three or four shots. Harold started knocking on doors. Harold saw the defendant with his gun follow Debra into the street. Debra went to the car (a blue Chevy hatchback) parked in front of the defendant's car, but it pulled off and left. The defendant said "Look at them run now." Harold ran around the corner till the police arrived

and told the defendant to get down on the ground. Harold told the police the defendant did the shooting, and the police arrested the defendant. Harold saw the defendant laugh like this was funny to him.

CLINICAL IMPRESSION:

Axis I - 303.90 Alcohol dependence, in remission by incarceration
304.20 Cocaine dependence, in full remission by report

Axis II 301.60 Dependent personality features

Axis III - None reported

Axis IV - Psychosocial stressors: incarceration, pending capital murder charge

Axis V - Global Assessment of Functioning: 60 GAF before jail: 50

CLINICAL RECOMMENDATIONS:

1. Substance abuse treatment program:

   A. If released to community:

      1) Relapse prevention groups: 48 weekly sessions and then aftercare.
      2) Supervised antagonist therapies: Antabuse for alcohol and Naltroxene for cocaine.
      3) Random urinalysis at least twice a month.

B. If incarcerated, participate in an in-house substance abuse program.

2. Individual therapy to identify Dependent personality disorder features that may have contributed to the conduct charged and modify them.

FORENSIC RECOMMENDATIONS:

1. Encourage the defendant to recall the remainder of what he did upon his second return to the house, when he was accused of fatally shooting his girlfriend and a male companion, and shooting his sister. The claim of sudden onset of amnesia just prior to the shootings, after a detailed recollection of the rest of the events, is not credible and not psychological supportable.

2. Future Dangerousness, Whether there is probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? The following factors were considered in answer to the question of future dangerousness: statistical, environmental, and clinical judgment.

I. STATISTICAL FACTORS

1. **Past crimes.** Non-contributory. His past offenses were non-violent drug offenses.

2. **Age.** Decreased probability. He is now 33; street crimes are of lesser probability with this age group and older.

3. **Sex.** Increased probability. Males are more violent than females as a group.

4. **Race.** Black: Increased probability. There is an over-representation of Blacks among the violent offenders.

5. **Socioeconomics.** Stable by self-report: Decreased probability. Unstable by a witness' report: increased probability.

6. **Employment stability.** Stable by self-report: Decreased probability. Unstable by a witness' report: increased probability.

7. **Substance abuse.** Yes for alcohol at the time of the conduct charged, and cocaine by history: Increased probability.

II. ENVIRONMENTAL FACTORS

1. **Family environment.** No exposure to family abuse/violence: Decreased probability.

2. **Peer environment.** Did not Associate with peers that encouraged assaultive crimes: Decreased probability.

3. **Job Environment.** Past jobs were not conducive to violence: Decreased probability.

4. **Availability of victims.** Narrow victim pool: Decreased probability. This appears to be "family" type violence with a conjugal jealousy precipitated by

a perception of wife's infidelity; the victims were not randomly picked. Non-random victimizers are less dangerous than random victimizers.

5. **Availability of weapons.** Yes: Increased probability.

6. **Availability of drugs.** Yes: Increased probability.

III. CLINICAL JUDGMENT FACTORS

1. **Mental Illness.** There is no history of thinking disorder that is associated with assaultiveness. This factor is considered to reduce dangerousness.

2. **Anti-social personality disorder.** The defendant does not meet the criteria of anti-social personality disorder, though he has antisocial features. This factor argues for less probability for continuing violent threat to society.

3. **Specificity of the situation that induced the conducts** charged. **This appears to be a family type violence, influenced by** conjugal jealousy precipitated by his perception of wife's infidelity. This factor argues for less probability for continuing violent threat to society.

4. **Deliberateness.** Insufficient data from self-report. He does not remember shooting the victims, though he admitted to police he did the shootings at the time of his arrest. He appeared to be deliberate from witnesses' statements showing he returned a second time with a gun, forced himself into the house, and ignored pleadings not to shoot: Increased probability.

5. **Remorse**. He does not remember shooting the victim, though he admitted to the police he did the shootings at the time of his arrest: Increased probability.

6. **Post-conducts charged behaviors.**

a. Continuing crimes. None of the versions showed continuing crimes after the conduct charged since he was promptly arrested. This factor is not applicable as he did not have the opportunity to commit more crimes.

b. Fun: From one of the witnesses' statements, he supposedly gloated as people scrambled for safety, i.e., "Look at them run now", and he appeared to laugh like the whole thing was funny. This factor argues for more probability for continuing violent threat to society.

c. Surrender. He peacefully cooperated with his arrest, though the police had a gun pointed at him at the time of arrest. This factor argues for less probability for continuing violent threat to society.

7. **Personal factors that contributed to the conducts charged. There were personal factors reportedly operating at the** time of the conduct charged that may have made the conduct charged specific and limited to this offense circumstance, such that repetition of the offense in the future is unlikely. The apparent motivation was conjugal jealousy precipitated by his perception of his wife's infidelity. This factor argues for less probability for continuing violent threat to society.

9. **Environmental factors that contributed to the conducts charged. There were environmental factors reportedly operating at** the time of the conducts charged that may have made the conducts specific and limited to this offense circumstance, such that repetition of the offense in the future is unlikely, i.e., The presence of individuals that he perceived as participants in the wife's infidelity. He did not hurt the children. This factor argues for less probability for continuing violent threat to society.

10. **Effect of prolonged incarceration.** The defendant is of course less likely to be dangerous while incarcerated. The effect of prolonged incarceration (e.g., aging) in conjunction with physical restraints (e.g., security level and housing), rehabilitative efforts (e.g., education, substance abuse, punishment, psychiatric services) needs to be estimated. The prison system has enough resources to subdue what level of dangerousness he may bring with him: classification/security level system, housing restraints (administrative segregation and super segregation), supervision, crisis intervention (major use of force techniques), and psychiatric medication intervention.

His behavior record in jail and in previous prison stays may be used as a sign that he may do well in prison. He reported no assaults while in incarceration; he worked and attended school. Furthermore, lifers in the prison system tend to do well and better than short termers. The conditions, e.g., more space, less in-cell time, more out-of-cell activities, in prison is less conducive to acting out.

Overall, it appears that, without intervention, the defendant is more likely than not to constitute a continuing violent threat to society. However, if given life instead of death, the prison system has enough resources to safely incarcerate him. Additionally, the factors that can be manipulated and presently contribute to dangerousness can be controlled in prison. He can continue to age in prison; with minimum of 40 years time served, he will be in his 70's at the time of eligibility for discharge. Employment and financial instability is no longer a factor in prison. It is more difficult to gain access to drugs and alcohol and weapons in prison. His victim pool, already narrow in the instant offense because of its family violence features, becomes narrower in prison; furthermore, the prospective victims in prison are less naive in that they are aware of their environment and take the necessary precautions to minimize victimization. The dependent husband/wife relationship, that contributed to the conduct charged, is gone.

Thank you for consulting me on this difficult but interesting case. Please feel free to contact me if you have any questions.

/s/ Walter Y. Quijano
Walter Y. Quijano, Ph.D., P.C.
Clinical Psychologist.

TRANSCRIPT OF PROCEEDINGS, MAY 1, 1997
(OFFICER PAUL MCGINTY)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

REPORTER'S RECORD
TRIAL

May 1, 1997

VOLUME 25 OF 30 VOLUMES

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|16|DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Officer, please introduce yourself to the jury.

A My name is Paul E. McGinty.

Q Deputy McGinty, how are you employed?

A The Harris County Sheriff's Department.

* * *

Q On July 30th of 1995, did you respond to a call to 7327 Puerta Vallarta?

A Yes, ma'am, I did.

* * *

|18|Q When you arrived at 7327 Puerta Vallarta, what did you observe?

A When I pulled down Puerta Vallarta, I noticed a black male on the right-hand side of the road. I went past him and I observed a black female lying in the middle of the road.

Q You say lying in the middle of the road?

A She was in the middle of the road, yes. I believe her head was northbound and her feet southbound and she was lying in a pool of blood.

Q That was in front of the Puerta Vallarta address that you were responding to?

A Yes, ma'am, it was.

Q How far away was the black male that you said that you had observed walking in this neighborhood?

A Within sixty yards of where the lady was in the street.

Q In which direction was that individual [19]walking?

A He was walking away from where she was. I remember seeing him on the side of the road north of the location of where the lady was.

* * *

Q What did you do when you first drove up to the scene?

A I got out of my patrol car and went up to the lady in the street who later was identified and I found out to be Debra Gardner. I told our dispatcher that there had been a female shot in the street

and to send Life Flight and the paramedics en route also.

Q What did her condition appear to be when [20]you observed her at that time?

A She appeared to have been shot in the chest. Her shirt had blood on it. There was blood beneath the body where it had come out of the body.

* * *

Q Was she alive?

A At that time, yes, ma'am.

Q Was she talking?

A No, ma'am.

Q Could you observe anything about her physical condition? Was she trying to breathe?

A She was trying to breathe. She was still moving around but not saying anything that I could understand other than showing that she was in a good deal of pain.

Q After you had determined her condition and called for assistance, what did you do next?

[21]A I heard someone yelling towards me.

Q In which direction was that yelling corning from?

A It was coming from behind me because I was facing south so it was coming from the north.

Q What did you do when you heard this yelling?

A I turned around.

Q What did you observe?

A I observed two black males running towards me.

Q Did you recognize one of the black males as someone that you had seen previously?

A The closest black male to me was the black male on the side of the road which I first saw as I was corning down Puerta Vallarta.

Q The second black male, did you recognize him?

A At that time, no. That was the first time that I had seen him.

Q How far away was the black male that you didn't recognize? How far away was he from this other black male?

[22]A Probably ten to twenty yards further north away from where the first black male was.

Q So they were ten to twenty yards apart?

A Yes, ma'am.

Q What did you do?

A I turned around because the male further from me was yelling: "He shot her. He shot her."

Q When you heard this man saying, "He shot her, he shot her," what did you do?

A I pulled out my service revolver and I took the closest black male to me into custody.

Q How did you do that?

A They were running toward me. I pulled my service revolver out and told him to lay down on the ground and he did. I took him into custody.

Q When he laid down on the ground, what did you do?

A I went up to him and handcuffed him, patted him down, and put him in the back of my patrol car.

Q Did you find any weapons on him at that [23]time?

A No, ma'am.

Q Where was your patrol car?

A It would have been one house north of 7327 Puerta Vallarta.

Q You placed him in the back seat of your patrol car?

A Yes, ma'am.

Q Then what happened?

A And then I went back to where Ms. Gardner was lying in the street. About that time a lady comes out of the house and is standing in the driveway. It turns out that her name is Phyllis Taylor, and she has a gunshot wound to her chest.

Q But she was still walking?

A Yes, ma'am.

Q Did she say anything to you?

A She was screaming. She was hysterical and it was very hard to understand what she was saying. I go to her but it's very difficult to understand --

MR. EASTERLING: I'd object to hearsay.

[24]THE COURT: Overruled.

A I had a hard time understanding her. I get enough information out of her to know there's probably a DOA in the house.

* * *

[25]Q What did you find inside the house?

A Inside the house we went through the family living room, the hallway that goes to the bedrooms, and in that hall was a black male that was laying face down.

Q What was his condition?

A He had a gunshot wound to the chest. His shirt was bloody and there was blood [26]on the carpet. The EMT pronounced him DOA.

* * *

Q Did you find any other witnesses in the home?

A Yes, ma'am. Whenever we went into the house, there were several children that were coming out of the house. It was a very chaotic scene because the kids were screaming.

Q What condition were the children in?

A Well, the children's physical well-being was fine but they were screaming because [27]they were scared. They were crying and wondering what was going on.

Q What were the ages of the children, if you recall?

A I believe their ages were from about two to twelve.

Q Were some of these children determined to be witnesses when this had occurred in the house?

A Yes, ma'am.

Q Because they were witnesses, what did you do?

A I got all the children together, and as other units arrived they were assigned different spots. Life Flight was en route. Life Flight landed and left. There were officers given responsibilities to secure the scene inside the house and outside the house, some had duties to keep witnesses away from each other and to keep people that were coming by to see what had happened, to keep them away from the scene. I took the kids and we went to the house next door.

[28]Q Eventually did the Homicide Detectives show up to talk to witnesses and gather evidence there at the scene?

A Yes, ma'am, they did.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 1, 1997
(HAROLD EBNEZER)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

REPORTER'S RECORD
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* * *

[90]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Sir, please state your name for the ladies and gentlemen of the jury.

A Harold Ebnezer.

* * *

Q Did you know the deceased in this case, Kenneth Butler?

A It's my brother.

* * *

[95]Q Do you remember approximately what time [96] that you left the game room that night?

A We left the room at closing.

* * *

Q Who all went to Debra's house from the game room?

A Just me and my brother Kenneth and Phyllis and Debra.

Q Was there anyone else at Debra's house when you got there?

A Yes, the kids. There was Phyllis' little baby and Debra's kids, Debra's three.

* * *

[97]Q Do you remember what room in the house you were in?

A We was in the living room.

Q At some point as you sat in the living room that night, did something unusual occur around near the door?

A Yeah, we was sitting there and we was laughing and joking and, you know, there came a big old boom, boom, on the door.

* * *

[98]Q What did Debra do when she heard the bang at the door?

A She picked up the telephone and dialed 911.

* * *

Q After you heard the banging and you heard Debra pick up the phone, what is the next thing to happen?

A Debra asked us to go to the back of the house, just to go to the back of the house. She didn't want any type of problems.

99]Q Did you do that?

A Yes, I did.

Q Did someone else go with you?

A No, Kenneth went in one room and I went in another room.

Q Were the kids back in that part of the house?

A Kenneth was in the back room where the kids was.

Q What's the next thing that you remember happening?

A The next thing I remember is he kicked the door in and he comes on in. He walked all the way into Debra's house. Okay, I'm standing in Debra's bedroom.

Q Let me stop you for a minute. When you say he, is he the person in the courtroom today who came into Debra's house after he kicked the door in?

A Yes, ma'am, he's sitting right there.

Q What's he wearing?

A He's wearing a burgundy shirt or maroon or whatever you want to call it.

MS. HUFFMAN: At this time may the record reflect that the [100]witness has identified the defendant, Duane Edward Buck?

THE COURT: The record will so reflect.

BY MS. HUFFMAN:

Q When you say he walked in, where were you standing at that time?

A Debra's bedroom.

Q Inside the door or where were you standing?

A You see, from the hallway when you come in Debra's bedroom like this, I'm like standing right here, so it's a part right here that you have to walk past. When he walked past this way, when he walked all the way in the room and saw me standing right there, Phyllis told him that I was her friend.

Q Where was Phyllis?

A Phyllis and Debra came in the room right behind him.

Q They were following him?

A Yes.

Q What were they saying?

[101]A Well, he was the one that was doing all the hollering and goings on here, you know. I didn't really know what was going on.

* * *

Q Was he saying something?

A He was hollering. He was cursing her out and stuff like that.

* * *

Q Did he appear to be -- what was his demeanor? Was he angry or was he calm?

A No, he was upset.

* * *

[102]Q Mr. Ebnezer, let's go back to where you were in the bedroom area and Mr. Buck has come into that back area.

A He started fighting on Debra.

Q What do you mean by that?

A Hitting up side the head, slapping her up side the head.

[103]Q Do you know how many times he hit her? Do you remember?

A He hit her two or three times before I got between them.

Q How did you get between them?

A All I did was walk in between them and kept them an arm's distance apart, him an arm's distance apart, because she wasn't trying to get at him. He was steadily trying to get at her.

Q Was that all that happened in the back bedroom area?

A Yes, ma'am, it was.

Q Can you estimate about how long that went on? Was it just for a few minutes, a few seconds, or how long?

A It went on maybe for five or ten minutes.

Q What happened after that incident happened back there in the bedroom area?

A We finally made it back up into the front of the house.

Q Then what happened?

A Mr. Buck there, he kept on trying to challenge me and my brother to a fight.

* * *

[104]Q Did you ever assault or strike Mr. Buck [105]in any way?

A No, ma'am. No, ma'am.

Q After you said he was challenging you to a fight, what did you recall happening next?

A I think to the best of my ability I believe I went and sat on the couch. I kept asking Phyllis to tell him to shut up because Phyllis is telling me this is her brother. So I'm telling Phyllis that she needs to tell her brother to shut up because he stayed talking this trash, you know, like he Mr. Big.

Q Where were you while this was going on?

A In the living room.

Q Did Debra ever give the defendant anything?

A He said he came there for his clothes. All he said was that he came there for his clothes.

* * *

Q What happened then?

A She gave him his clothes and he stayed there. He stayed there. He said he was [106]going to wait until the police got there so he could tell them that he kicked the door in.

* * *

Q Did he at some point leave?

A He left.

* * *

Q Did you talk with him before he left?

A Yeah, we talked. We told him like it was. We didn't want to be in their business, you know. My brother even tried to tell him he understood how he might feel, you know, if he was to come to his house and another man, you know, is there. You know what I'm saying? You got to understand what I'm saying.

Q Did your brother explain to him that you [107]were all friends with Debra?

A We tried to but he didn't want to listen.

* * *

Q Did he seem calmer to you when he left?

A Calmer than when he got there.

Q After he left, what did you do?

A After he left, you know, we sat there for awhile and we were talking about the situation, you know, and I fell asleep on the couch. Phyllis fell asleep on the couch. Debra fell asleep in the living room but it's really like the dining room. She fell asleep on the couch over there.

Q Where was Kenneth when you fell asleep?

A When I fell asleep, he had went to Debra's bedroom and laid across her bed [108]and went to sleep.

Q You all had visited for awhile after Mr. Buck left?

A Yes, ma'am.

Q Do you recall about what time you fell asleep?

A I guess it might have been maybe 4:30 or 5:00, or maybe a little later. I don't remember.

Q At some point as you were sleeping, did something wake you up?

A Yes, ma'am.

Q What did you hear?

A A boom at the door again.

Q What kind of boom?

A Like somebody beating out the door again.

Q What did you do when you heard the noise at the door?

A I jumped up because after what went on before, I knew it was him. I knew he was coming back so I jumped up. I was going to open the door and jump his behind. To be honest with you, he was going to get it.

[109]Q Did you have any weapons?

A No, ma'am.

Q When you say he was going to get it, what did you mean?

A I mean I was going to put these hands on him.

Q After you heard the boom at the door, the bang at the door, what happened next?

A After I heard the banging, you know, I went to the door and I tried to open the door but I couldn't get it open, you know, because after the first time he kicked it in, he messed up the lock. So I told him -- he say, "Open the door, Man," and I said, "Well, Man, I would open the door but you messed up the lock when you kicked the door in the first time."

* * *

[110]Q What did he do?

A He kicked the door in. He kicked the door once, you know, and I was standing right in front of the door. The first time that he kicked it, if it had flew open, it would have hit me right in the face because I was standing that close to the door. I took a step or two back. He kicked it open again, and when it opened, it flew open, he came in with a shotgun in his hand and raised it up and fired it at me.

* * *

Q At the time that he came in that time, did you expect that he was going to have a weapon?

A No, ma'am, I didn't.

Q Did you even dream that he had a weapon?

A No, ma'am, I didn't think he was coming back because he was in that calm a state when he left. He had nothing to come [111]back for.

* * *

Q At what point did he fire the shotgun?

A As soon as he stepped in, he fired it. He fired it as soon as he stepped in.

Q Where were you standing?

A Directly, directly in front of him.

Q What did you say when you saw him point the shotgun at you?

A When he kicked the door in I asked him, "Man, what is this?" He says, "This," and he raised it and fired it. When he do that, I do like this and the shell flies right past me and hits the wall. I turn around and see the hole in the wall so I take off running through the back because Debra's got these patio doors, glass patio doors in her bedroom.

* * *

[113]Q You said that after he shot you looked back and you saw a hole in the wall; is that correct?

A Yes.

Q And you took off running?

A Yes, ma'am.

Q Who was in the living room at that time?

A Phyllis was in the living room. Debra had -- she had hooked them. She was running. She was trying to run also.

Q Which way did you run?

A I ran through the hallway back into Debra's bedroom and went out the glass patio doors. Right here there was a fence. Debra was trying to get over the fence so she was in my way so I ran on around the house, but as I'm running around the house I hear two or three [114]more shots going off inside the house.

* * *

Q When you're running down the hall and out of the house, did you see your brother in Debra's bedroom?

A Yes, ma'am, I ran past him.

Q What was he doing?

A Standing there.

Q What?

A He was in Debra's bedroom. He was standing right at the patio doors.

Q Did you say anything to him?

A Yes, I touched him and I said: "Look out, Kenneth. He got a gun."

Q What did you do then?

A I kept going out the door. I'm thinking my brother is behind me.

Q Was he behind you?

A No, ma'am, evidently he didn't come.

Q You said when you got out of the patio door that you could see Debra. Where was she?

A Okay. As you go out the patio door, [115]there's a fence line there. She was right at the fence line, you know, trying to get over the fence.

* * *

Q Was she successful in getting over it?

A No. She had a hard time trying to get over the fence. That's what made me head the other way.

Q Which way did you go?

A I went out -- after I seen her trying to jump this fence, I went to the back of the house.

Q At what point did you say you heard three or four more gunshots?

A As I was running around the back of the house.

Q Then where did you go?

A I went over the fence. Finally after I got over that fence, I come around to the front of the house and I started running down the sidewalk. As I was running down the sidewalk I'm looking back. Debra had run out to the street. [116]Somebody had come with him. They were in a blue car.

Q Mr. Ebnezer, you didn't see anybody come with the defendant; is that correct?

A No, ma'am.

* * *

[117]Q When you went out there, you saw another car? What was Debra doing in relation to that other car?

A Debra, she ran over to the driver's side of the car and she tried to get in the back seat of the car. She told them, she said: "Y'all, let me in. He got a gun."

Q What did the people do?

A They drove off and left her in the middle of the street.

Q Where were you when you saw Debra trying to get help from that car?

A I had just come from around the back of her house. I had just come back from there where I got over the fence. I was just striking out down the sidewalk.

Q So she beat you out into the street?

A Yes, ma'am, she did.

Q Did you continue to look back towards the front of the house as you ran off?

A Yes, ma'am, I looked back.

Q What was she doing?

A Well, after the car drove off, he was [118]running right up to her.

Q Who is he?

A Buck here.

Q Did he have anything in his hands?

A Yes, ma'am, one of these rifles.

* * *

Q What was Debra doing?

A She was in the middle of the street pleading with him.

* * *

Q At some point did you quit watching what was happening there in the street?

A Yes, ma'am, because I was trying to get close to somebody's door so I could knock on the door and ask them to call the police.

* * *

[119]Q At some point did you find someone where you could get to the door and they could help?

A Yes, ma'am. I finally got to a door and beat on it and somebody walked over and I asked them to call 911 because somebody had been shot. Then I

gave them my brother's phone number and asked them to call my brother.

Q Do you know if they called 911?

A Somebody did.

Q After you had been at that house and asked somebody for help, what did you do next?

[120]A Well, I stayed there for a moment, you know, because I'm looking to see if he's coming around the corner. Actually, you know, I don't know what to do.

Q What did you do when you finally did something?

A I ran back around the house once I heard the police coming. I heard the sirens.

* * *

Q Where did you go when you heard the sirens?

A I turned around and headed back to the house.

Q What did you see when you got back to the house?

A When I got back to the house, or before I got back to the house, the officer was standing over Mr. Buck. He had him face down on the ground. He was standing over him and he was shouting

to Debra's daughter: "Is this the shooter?" I run up to him and told him he was the one.

Q Did you tell the police officer at some point about what you had witnessed and [121]what you believed to have happened?

A No. What I remember is that the Deputy put him in the car, and by the time he put him in the car, I went back to try to help Debra and do whatever I could.

Q What was Debra doing?

A Debra was laying in the middle of the street. She asked me, she kept asking me to put pressure on her back because she couldn't breathe.

Q Did you see blood on her?

A Yes, ma'am, she had blood all over her.

Q Was she trying to breathe?

A She was trying.

* * *

Q After you tried to help Debra, what did you do?

A I looked and seen Phyllis had come outside. She was sitting on the ground there and I went to

check on her to see if she was all right, and then I went [122]back in the house, you know, because I was looking for my brother because I noticed my brother was not nowhere.

Q At that point did you know your brother had been shot and killed?

A Not until I got in the house and seen him.

Q When you went in the house, what did you see?

A I seen my brother in the hallway laying face down.

Q What did you do?

A I turned him over and held him.

Q Was he alive?

A No, ma'am, he was already dead.

Q At some point did you meet with the police later in the day and give them a written statement about what you had witnessed?

A Yes, ma'am, they took me from the scene.

Q Down to the Police Station?

A Yes, ma'am.

Q Before you went down to the Police Station did you have the opportunity to see Mr. Buck again?

[123]A Yes, ma'am.

Q Where was he when you saw him again?

A In the police car.

Q What was he doing in the police car?

A He was laughing and joking and taunting the rest of my family. He's sitting up there and laughing. He just killed two people and he's sitting up there and laughing and taunting and joking about it.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 1, 1997
(PHYLLIS MARY TAYLOR)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

REPORTER'S RECORD
TRIAL

May 1, 1997

VOLUME 25 OF 30 VOLUMES

* * *

[201]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Ma'am, please introduce yourself to the jury.

A Hi. My name is Phyllis Mary Taylor.

* * *

Q Ms. Taylor, do you know the defendant, Duane Buck?

A Yes.

[202]Q How do you know Duane Buck?

A He's my stepbrother.

* * *

Q You consider him to be your brother?

A Yes.

Q Were you raised in that manner, as brother and sister?

A Yes.

Q Did you know Debra Gardner?

A Yes.

Q At the time of her death, how long had you known her?

A Approximately seven years.

Q What kind of relationship did you have with Debra?

A She was my best friend. She was more like a sister.

Q Do you know the relationship, if anything, that was between Debra Gardner and Duane Buck?

A Yes.

[203]Q What kind of relationship did they have to your knowledge?

A To my account, one time they were a pretty good couple. They were breaking up and then they'd get together, break up and get together.

Q So it was an off and on relationship?

A Yes.

Q The week prior to Debra's death, what had happened in the relationship?

A Approximately two weeks before the incident they had broke up, separated.

* * *

[204]Q The night of July 29, 1995 and the early morning hours of July 30th of 1995, where were you that evening?

A I was with Debra, Harold, Kenneth, and Kenneth's sister and brother.

Q Where had you been?

A We had went to a game room.

* * *

[205]Q When you were at the game room, do you remember about how long you stayed at the game room?

A About an hour.

Q What were you doing there?

A We played games, shot pool.

Q When you left the game room, where did you go?

A We went to Debra's house.

[206]Q Who all went to Debra's house?

A Me, Debra, Harold, Kenneth, and some of the brothers and sisters was going to meet us there at the house but they never showed up.

Q What did you do once you got to Debra's house?

A Our plans were to play cards, but we all ate and then right after we finished eating is the time when Duane came and kicked the door in so we didn't get a chance to play cards.

Q Where were you when you said Duane kicked the door in?

A I was in the living room. I was going to open the door but Debra for some reason didn't want the door opened.

Q Did you know it was Duane at the door?

A Yes.

Q How did you know it was your brother?

A Because I could hear his voice. He was screaming and hollering open the damn door.

Q Was the door opened?

A No.

* * *

[207]Q At some point did you see your brother?

A After the door was kicked in.

Q Was the door kicked in right away, or how long did it take before the door got kicked in?

A Approximately, I guess, about seven minutes.

Q Once the door was kicked in, what happened?

A When the door was kicked in, we were in the bedroom, and he came in and asked what was going on. We said nothing. Then he started to jump on her.

Q On who?

A Debra.

Q What do you mean by jump on her?

A Fighting. He started fighting her, trying to fight her.

* * *

[217]Q Ms. Taylor, after you had the conversation in the kitchen with the defendant, do you recall what happened next?

A After that they continued arguing and I think Duane had got some things of his, and then he left.

* * *

[218]Q When he left did you think that everything was settled?

A Yes.

Q Or did you think everything was still up in the air?

A No, he hugged me and kissed me and told me that he was sorry for the behavior, the way he carried on, and he shook Harold and Kenneth's hands and said he was sorry and he left.

Q At some point did you know whether or not the police came?

A When the police arrived in forty-five minutes, Duane had made it back to Northeast Houston and he had phoned back to the house; and about the time that he phoned, the police was knocking at the [219]door.

* * *

Q Did you talk to him?

A I talked to him.

Q What was the conversation about?

A He asked me to let him speak to Debra.

Q Did you do that?

A I told Debra that he was on the phone and wanted to speak to her but she didn't want to get on the phone.

Q Did you tell him that?

A Yes, I did.

Q Did she ever talk to him on the phone when he called back?

A No.

* * *

[220]Q What kind of things were you telling him?

A Nothing. He just kept telling me to put Debra on the phone and I kept telling him that she didn't want to get on the phone. After that he hung the phone up in my face.

* * *

Q Had Debra gone out and talked to the police?

A Yes.

Q At some point did she come back inside?

A Yes.

* * *

Q When Debra came back into the house after talking to the police, what did you all do?

A After that we sat on the couch just talking about things that had happened. Before I knew, everyone fell asleep.

Q Where did you fall asleep?

A On the couch.

* * *

|221|Q What woke you up?

A I heard the banging at the door but I didn't get up right then. Debra came and woke me up and told me that Duane |222|was back at the door and to get up. I sat up on the couch.

Q Did you get up from the couch?

A No.

Q Did you see Duane?

A Yes.

Q What was he doing?

A Well, he kicked the door in again, and when he kicked the door in, Debra and Harold took off running because he said for everybody to run because he had a gun, but I just sat there. I couldn't move. I guess I was in shock. I didn't move right then. I just sit there.

* * *

Q When is the first time that you remember seeing him with a gun?

[223]A I finally seen the gun when he come through the door.

Q Where did you see the gun?

A In his hands.

Q How was he holding the gun?

A Like this.

Q Pointing it out?

A Yes.

Q Then what did he do?

A After that he came up to me.

Q Where were you?

A I was sitting on the couch.

Q What did he do?

A He approached me. I was asking him what he was doing, and I begged him not to shoot me because, you know, nobody deserves to be shot. He said: "I'm going to shoot your ass too." Then he put the gun to my chest and pulled the trigger.

* * *

|225|Q You're sitting there on the couch?

A Yes.

Q What did he do with the gun?

A He put it like this.

Q What did he say?

A He says: "I'm going to shoot your ass too."

Q What did you say?

A I begged him, I said: "Duane, please don't shoot me. I'm your sister. I don't deserve to be shot. Remember I do have children." And he says: "I'm going to shoot your ass too."

Q What did he do?

A He pulled the trigger.

Q Did the gun fire?

A Yes.

Q Did you have a wound in your chest as a result of that gunshot?

A Yes.

* * *

[226]Q After he shot you, Phyllis, what did you do?

A I just sat there.

Q Did you realize that you had been shot?

A Yes.

Q What were you feeling?

A Actually I couldn't believe that I was shot. I just sat there and I said a prayer.

Q Did you try to help yourself?

A I just put my hand here. I couldn't believe he actually shot me. I just sat there with my hand over it.

Q Do you remember hearing anything when you are sitting there holding your chest?

A Yes.

Q What did you hear?

A I heard more gunshots.

Q Do you know how many more gunshots you [227]heard?

A It was either one or two.

Q Where were they coming from?

A They were coming from the back of the house towards the bedrooms.

Q At some point did you get up?

A Yes.

Q Where did you go?

A I walked through the house trying to get to a telephone.

Q What did you see?

A I saw Kenneth lying on the floor.

Q What was Kenneth's condition?

A He was shot face down.

Q What did you do?

A I looked down to see if he was breathing. He wasn't breathing.

Q Did you see any of the kids around at that point, or do you remember?

A Not at that particular time.

Q What did you do then?

A I then approached Debra's son's room, Devon. When I went into his room, I opened the closet and Devon and Kanetta were in the closet. I shut the closet |228|door back and went to the telephone and dialed 911.

Q Did you talk to a 911 operator?

A Yes.

Q Did you tell them that you had been shot?

A Yes.

Q You've heard the 911 tape?

A Yes.

Q Does your voice appear on that 911 tape?

A Yes.

Q At some point you say something about three or four in reference to -- what were you talking about? It sounded like you said you had been shot like three or four times? What were you saying?

A I told her I needed help because I had been shot in the chest, and I said that there were three or four more people that had been shot. I know that Kenneth had been shot so by hearing the other gunshots, I didn't know who else was shot.

Q You talked to the 911 operator, but did you have a long extended conversation [229]with them?

A No. The phone was disconnected.

Q What did you do then when you thought you were disconnected from 911?

A After then I called my house and no one answered. Then I called my father.

Q What did you tell your father?

A I told him that I had been shot in the chest and that it was getting hard for me to breathe and I needed some help. I didn't want to die. He asked me did I know who shot me and I told him yes. He asked who shot me and I told my stepbrother Duane, and at that particular time I heard him talking so I hung up the phone and got in the closet.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 2, 1997
(PHYLLIS MARY TAYLOR)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

REPORTER'S RECORD
TRIAL CONTINUED

May 2, 1997

VOLUME 26 OF 30 VOLUMES

* * *

[241]Q When you walked out, did you see the defendant? Did you see Duane Buck, your brother?

A Yes.

Q Where was he?

A He was sitting in the police car.

Q What was he doing?

A He was laughing.

Q Did you say anything to him?

A No.

Q What did you do?

A By then I had put my hand down and one of the guys had realized I was shot so they told me to sit on the ground.

Q Did you do that?

[242]A Yes.

Q Did you have a chance to walk over to see

Debra?

A No, I got halfway to her.

Q But you could see Debra?

A Yes.

Q What was going on around Debra?

A She was laying there saying "Help me, help me. Somebody please help me. I can't breathe."

Q Did she appear to be bleeding?

A Yes, she was in a puddle of blood.

Q After the people there realized that you had been shot, what did they do to help you?

A I started coughing up blood so they gave me oxygen and by then Life Flight had landed and they put me on a stretcher and took me by Life Flight to Herman Hospital.

[243]Q Tell us what happened when you got to the hospital?

A When I got to the hospital, I immediately went into surgery.

Q What did they do in surgery?

A They put in a chest tube into my chest.

Q Did you later learn where the bullet had gone in

your chest?

A Yes.

Q Where did it go?

A It went into my chest about an inch from my heart and it landed in the back, in my back, in my shoulder blade.

Q How long were you in the hospital the first time that you were admitted on the 30th day of July?

A Approximately two weeks.

Q During those two weeks, what kind of treatment did you have?

A I had X-rays just about every day. They checked my chest tube and blood.

Q Were you in pain?

A Yes.

Q Did you have any follow-up surgery or [244]treatment as a result of that gunshot wound?

A Yes.

Q When was that?

A If I recall, it was in October of '95.

Q What happened then?

A They removed the bullet.

Q Why did you go some months before they removed it?

A Because I was having difficulty with the usage of my arm. It continued to bother me so I talked to my doctor about removing it.

Q Did he agree to do that?

A Yes.

Q What about now? Do you have any symptoms, any follow-up symptoms as a result of that wound?

A Yes. Sometimes my arm goes out on me. It's hard to lift things every now and then.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 2, 1997
(DEVON GREEN)

* * *

[272]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Would you please state your name for the jury?

A Devon Green.

Q Devon, how old are you?

A Thirteen.

Q Do you go to school?

A Yes, ma'am.

Q Where do you go to school?

A Spring Forest Middle School.

Q Who do you live with now?

A Doris Gardner.

Q Who's that? How is she related to you?

A My aunt.

Q Who else in your family now lives with Doris?

A My cousin Kanetta.

* * *

Q Did you all used to live together?

[273]A Yes, ma'am.

Q Where did you used to live together?

A In Alief.

* * *

Q Who did you live with?

A With my mom.

Q Who was your mom?

A Debra Gardner.

Q She's now dead?

A Yes.

Q Do you remember your address where you lived over in Alief?

A No.

Q Was it on Puerta Vallarta Street?

A Yes, ma'am.

Q Is that the house where your mom was killed?

A Yes, ma'am.

* * *

[275]Q On the night your mom was killed, do you remember who all was at the house?

A If I remember, Harold, my mom, my sister, my cousin, me, Kanetta and Soria (phonetic spelling).

Q Keshawn and Soria were the little ones?

A Yes.

Q They were toddlers?

A Yes.

Q Were you awake the first time that Duane Buck came over in those early morning hours?

A I was asleep but I heard a bunch of noise and woke up.

Q Where were you sleeping?

A In my bedroom.

Q Was anyone else with you?

[276]A My cousin.

Q Who is your cousin?

A Kanetta.

* * *

Q What did you do when you heard that noise?

A I went in the living room to see what was going on but they were in the hall.

Q What did you seen when you were in the hall?

A Duane was trying to grab my mom and take her in her room.

* * *

[277]Q What happened after that? Do you remember?

A Somehow they were in the kitchen.

Q What were you doing during that time?

A I was just standing there looking and holding my sister.

Q Were you afraid?

A Yep.

Q What happened after they went to the kitchen?

A Him and Phyllis started talking to each other. He picked up a stick and raised it up and said he would hit her with it.

Q Did he hit her with it?

A No.

Q What did he do with the stick?

A He had put it down.

Q What else do you recall happening during that time?

A They was talking and then he left.

Q Do you know how long he was there?

A About thirty minutes.

* * *

[278]Q After he left, what did you do?

A We just stayed there for a little while and then we went back to sleep.

Q Where did you go to sleep?

A Back in my room.

Q Who was with you this time?

A My cousin.

Q At some point were you awakened?

A Yes, around 6:00 o'clock.

Q What woke you up?

A A gunshot.

[279]Q One gunshot?

A Yes.

Q Did it sound like it was outside or inside?

A Inside.

Q What did you do when you heard the gunshot?

A Me and my cousin woke up and went in the closet.

Q In your bedroom?

A Yes.

Q What happened after that?

A I heard a lot of yelling.

* * *

Q Did you recognize any of the voices?

A Yes.

Q Who did you recognize?

A I knew it was Duane yelling.

Q Let me ask you this. Did you know where Kenneth was?

A No.

Q Did you hear Duane say something to Kenneth?

A Yes, he said something like he was [280]sleeping with my wife or something like that.

Q Where did you hear the voices coming from?

A The hallway.

Q Next to your bedroom?

A Yes.

Q After you heard Duane say that, what did you hear?

A I heard the gunshot.

* * *

Q Could you point out for the jury which room you were in and which closet you were hiding in?

A (Indicates.)

[281]Q Right there?

A Yes.

Q That's where you heard Duane say something to Kenneth?

A Over here out of the closet.

Q Tell the jury where you were when you heard that?

A Right here.

Q You can have a seat.

After you heard the gunshot, what did you do next?

A I went outside to see who had got shot.

Q Was that immediately afterwards?

A Just about two or three minutes later.

Q So you waited a little while?

A Yes.

Q Were you scared?

A Yes, ma'am.

Q When you opened the door, what did you see out in the hallway?

A I just saw Kenneth leaning up against a wall and my sister trying to help him.

Q What sister?

A Shennel.

Q What did Kenneth look like?

[282]A He was like he was shot.

Q Did you see any blood?

A He was throwing up a lot of blood.

Q Was he saying anything?

A He was trying.

Q What was he saying?

A He was trying to tell my sister to call the police. Then he started talking about something else, and then I left.

Q Where did you go?

A I went to the restroom with my cousin.

Q Which cousin?

A Kanetta.

Q What were you doing in the restroom?

A She was in the restroom looking in the mirror.

Q Was she scared?

A Yes, it looked like she was.

Q Do you think she was in some kind of shock?

A Yeah.

Q What did you do next?

A I left. Me and my sister went outside.

Q Which sister?

A Shennel.

[283]Q Where did you go?

A We went out and we seen Duane running after Harold.

* * *

Q Where did you see Duane?

A He was right next to the front of the garage running after Harold.

* * *

Q What happened after you saw Duane going after Harold?

A He started saying: "Punk, you better keep running and don't come back."

* * *

Q You're going to have to slow down. Where was your mother?

A At first she was running outside on the [284]street and then a car pulled up and stopped.

* * *

Q What did your mom do with the car?

A She went to the window and told them to open the door.

Q Did they help her?

A No, they drove off when they seen Duane coming behind her.

Q What was he doing when he came up behind your mom?

A He was talking but I couldn't understand what he was talking about.

Q Did he have anything in his hand?

A He had a gun in his hand.

* * *

Q What was your mom doing?

A She was -- she had turned around and [285]said: "Please don't shoot me. Please don't shoot me. Why are you doing this in front of my kids?"

Q What did Duane do then?

A He just shot her.

Q He pointed the gun directly at her?

A Yeah.

* * *

Q What did you do when you saw him shoot your mama?

A We didn't know why he shot her.

Q What was Duane doing?

A He was walking back towards the garage.

Q What did he do when he got back towards the garage?

A He got another gun out of the garage.

Q He had two guns then?

A Yes.

Q What did he do then?

A He put them in the trunk of the car.

Q Where was the car parked?

A Like on the bumper (sic) of the sidewalk.

Q Where did he put the guns?

[286] A Into the back or trunk of the car.

Q What did he do after that?

A He tried to start the car. He came back up to my mom and he said: "It ain't funny now. You ain't laughing now."

* * *

Q Was your mother laying there bleeding when he said that?

A Yes.

* * *

[287] Q After he did put the guns in the trunk, then he tried to start the car?

A Yes.

Q What happened then?

A It wouldn't start.

* * *

Q Did he stay in the car for awhile trying to start it?

A Yes.

Q Then what happened?

A He opened the hood of the car and tried to see what was wrong with it.

Q Did he fix it?

A No, ma'am.

Q What happened after he kept the hood up and couldn't fix it?

A He just messed with it awhile and then started to walk down the block?

Q He started leaving?

[288]A Yes.

* * *

Q At some point right after that did you see the police?

A Yeah.

Q Did you see the police take him into custody? Were you inside or outside?

A I was outside when the police drove up. Duane was acting like he ain't done nothing. He was walking slow so I told the police that was him.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 2, 1997
(SHENNEL GARDNER)

[301]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Would you introduce yourself to the jury, please?

A Shennel Gardner.

Q How old are you, Shennel?

A Fifteen.

Q Do you go to school?

A Yes, I do.

Q Where do you go to school?

A Forest Brook.

Q Speak into the microphone. Where do you go to school?

A Forest Brook.

* * *

Q Who do you live with, Shennel?

A My grandmother.

Q What's her name?

A Annie Gardner.

[302]Q How long have you been living with your grandmother?

A About two years now, going on two years now.

Q Where did you live before you lived with your grandmother Annie Gardner?

A With my mother, Debra Gardner.

* * *

Q On Puerta Vallarta Street?

A Puerta Vallarta Street.

Q How long had you lived at that address before your mom was killed?

A I guess going on a year.

Q Who all lived at that house?

A My mother, me, my brother, my sister Kanetta.

Q Do you know a Duane Buck?

A Yes, I do.

Q How do you know him?

A He was my mom's friend.

Q Did he stay with you at your house on Puerta Vallarta sometimes?

A When we first moved in he wasn't there but he came off and on.

* * *

[303] Q The night before your mom was killed or in the early morning hours before your mom was killed, were you awake or asleep in the early morning hours?

A I was awake because my leg was cramping.

* * *

[307] Q Do you know whether or not during the first time that he came over if someone had called 911?

A Yes.

Q Who called 911?

A Me.

Q Had your mama called before?

A Yes.

* * *

[308]Q Do you remember what you told them?

A I told them to send the police because someone here was trying to jump on my mama.

Q Why did you call 911?

A Because I was afraid. I was nervous.

Q At some point did you see Duane leave?

A Yeah, he was getting into the truck.

* * *

[309]Q After the police came, what did you do?

A We went back in and got settled and went back to bed.

* * *

Q You're going to have to slow down. We'll [310]take this a question at a time. What woke you up? Do you know what woke you up?

A Phyllis. You know when you sleep, you still can feel anything going on around you, and then I

seen her on my phone trying to get somebody on the phone and she was holding her chest. I said: "Phyllis." I went up to her like that and I seen blood running out.

Q Did you call 911 again?

A Yeah.

* * *

[311]Q You could hear people arguing?

A Yeah, a commotion.

Q What do you mean by commotion?

A Commotion is like "Don't shoot me. Get out of my house." There was arguing. I'm crying on the phone trying to get the police to come. There was a whole lot of commotion.

Q At some point did you leave your room?

A Yes.

Q What did you see when you left your room?

A As soon as I left my room, there in the hallway was Kenneth Butler. I thought he was shot in the mouth because all I seen was blood coming out of his mouth.

Q When you saw him out there in the hallway, did you stop to talk to him?

A Yes, I was trying to see if he was alive.

Q Did he say something to you?

A Yes.

Q What did he say?

A "Try to find your mother."

* * *

[312]Q After you talked to Kenneth and he told you to go find your mother, what did you do?

A I went to look for my mother.

Q Where did you go?

A I went around the house. I found her on the ground here. He was chasing her. I was asking him, begging him not to shoot her and everything.

* * *

[313]Q Where did you find your mother?

A Outside.

* * *

Q When you went outside, what did you see?

A Him chasing after my mother.

Q Where was your mother?

A She was trying to stop a car but the car flew by and she couldn't run that fast. All she could do was just stop.

Q Where was she when you saw her stop?

A In the middle of the street.

Q Where was Duane?

* * *

314]A Behind her.

Q Did he have anything in his hands?

A Yes.

Q What did he have in his hands?

A A gun.

* * *

Q What did you see him do with the gun?

A He shot my mom.

Q Did you hear him say anything before he shot your mother?

A Yes, he was talking but I don't remember what he was saying to her. All I remember is jumping on him and begging him not to shoot my mom. My mom was begging for her life too.

Q What was your mom saying?

A "Duane, don't shoot me. Don't shoot me." I was saying the same thing. "Don't [315]shoot my mama." I jumped on his back and was hitting him.

Q How far away was Duane from your mother when your mother was begging him not shoot her?

A Well, I don't know exactly how far but it wasn't far away.

* * *

Q Can you stand down and show the jury how far away your mom was?

A I don't know exactly. I was begging him not to shoot her. All she could do was beg for her life.

Q What was Duane doing?

A Talking mess.

* * *

Q Do you know what he was saying?

A No.

Q Was he talking?

A Yes. "I'm going to shoot you. I'm going [316]to shoot your A." You know what A stands for, don't you?

Q Yes. What was he doing with the gun?

A He was pointing the gun.

Q At some point what did he do with it?

A Shot her.

Q Did he point the gun directly at her?

A Yes.

Q When he shot her, what were you doing?

A Hitting on him. When he shot her, I fell to the ground. I couldn't do nothing. All I could do is go crazy.

Q What did your mother do after she was shot?

A She fell.

Q What happened after you saw that and then you fell and your mom fell?

A I went back in the house to call.

Q Call 911?

A Yes, I did.

Q Did you ever go back outside again?

A Yes.

Q When did you go back outside?

A I went out to see if she was still alive. She was alive and she was telling me that [317]I needed to call the ambulance, to get the ambulance. All I could do was cry and run back inside and call.

Q At some point did you ever see Duane Buck again after he was in the police car?

A Yes, he was in the police car laughing. He thought it was funny and it wasn't.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 2, 1997
(MARILYN MURR)

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

* * *

[339]DIRECT EXAMINATION

BY MS. HOOD:

Q Please state your name.

A My name is Marilyn M-a-r-i-l-y-n second word Gay G-a-y last name M-u-r-r.

Q How are you employed, ma'am?

A I'm one of the Assistant Medical Examiners for Harris County Medical Examiner's Office, also known as the County Morgue.

* * *

[344]Q Did you perform an autopsy on Kenneth Ray Butler?

A Yes.

* * *

[346]Q What were the results of your external examination of the body?

A Well, the most significant was the gunshot wound of the front of the chest with the stippling that I mentioned. It was on the left chest.

Q What is stippling?

A Stippling is when the gunpowder from the gun impacts on the skin and causes little scratches that are in a pattern around the gunshot wound.

Q Is stippling present generally from a long-range shot or a short-range shot?

A A short range or what we call a close range gunshot wound.

* * *

|349|Q In regard to your internal examination, could you specifically describe what damage that bullet caused?

A Well, it perforated the heart so there was a hole through the heart. It perforated the lower lobe of the right lung so there was a hole through the lung, and around the gunshot wound track |350|there was hemorrhage and the tissue was ragged looking. Also in the chest cavity there was -- in the heart sac there was three hundred milliliters of blood, and in the chest cavity there was also blood present, one liter, which is about a quart in the chest cavity, and that was from the

heart being perforated and all the blood going into the chest cavity, and the lungs being vascular, they have a lot of vessels so that also bleeds.

* * *

[351]Q Based on the results of your autopsy, do you have an opinion as to the cause of death of Kenneth Butler?

A Yes.

Q What is it?

A Close-range gunshot wound of the chest. Homicide.

* * *

[352]Q I'd like to refer your attention now to Case No. 95-5359. Who is that autopsy report on?

A Debra Lynn Gardner.

Q Who performed that autopsy?

A Dr. Eduardo Bellas.

Q As Custodian of Records, are you competent to testify as to his results?

A Yes.

* * *

[353]Q Did Dr. Bellas also perform an internal examination?

A Yes.

Q What were the results of that?

A The bullet perforated the right lung, the middle lobe of the right lung, and then the diaphragm and then the liver. Then it came to rest in the side in the subcutaneous tissue which is the tissue right under the skin.

* * *

[357]Q Is the description of the injury which you have already described including the path of the missile or bullet consistent hypothetically with someone, with the victim being taller than the shooter, having to be on their knees perhaps and then shooter shooting downwards at an angle?

* * *

A Yes, it is.

Q Based on this Autopsy Report, do you have an opinion as to the cause of death?

A Yes.

Q What is your opinion?

A Gunshot wound of the chest. Homicide.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 6, 1997
(VIVIAN JACKSON)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

REPORTER'S RECORD
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May 6, 1997

VOLUME 28 OF 30 VOLUMES

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[30]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Ma'am, would you please introduce yourself to the jury?

A My name is Vivian Jackson.

* * *

[31]Q Ms. Jackson, do you recall approximately when you first met Mr. Buck?

A Yes.

Q When was that?

A About 1985.

Q What was the nature of your relationship with Mr. Buck? What kind of relationship did you have with him?

A An abusive relationship.

[32]Q Was he your boyfriend?

A My boyfriend.

* * *

Q During the time you lived with Mr. Buck, I think you told the jury it was an [33]abusive relationship?

A Yes.

Q Did he ever cause physical harm to you?

A Yes.

* * *

Q Did he ever hit you with his fists?

A Yes.

Q On what part of your body?

A My face, and all over really.

Q At the beginning of the relationship did he beat you initially?

A No, it wasn't often at the beginning.

Q At some point did it get worse?

A Yes.

Q When did that happen?

A About at the end.

Q How often was he assaulting you or [34]beating you during the end part of your relationship?

A Almost every day.

Q Did he ever use a weapon against you?

A Yes.

Q Tell us about that.

A At one incident he put a gun to my throat and another incident he put a gun to my face, but I didn't know if it was loaded or not.

Q You don't know if it was loaded?

A Yes.

Q Did he ever use anything to hit you with other than his hand?

A Yes.

Q What did he beat you with?

A A belt, a coat hanger, and one time he had a cast on his arm and he beat me in the head with it.

Q Did he ever try to burn you?

A He threatened to pour boiling water on me before.

Q During all those years he abused you, did you ever call the police?

A No.

[35]Q Why not?

A Because I was afraid.

Q Did you ever try to leave?

A I left him one time.

Q What happened?

A I went over to my sister's house and he came over and threatened me so I went back.

Q What did he say? How did he threaten you?

A He threatened to hit me if I wouldn't go back so I went back.

Q You said you had an abusive relationship with him. What kind of abuse was it? Was it just physical?

A Physically and mentally and emotionally.

Q How was it that you were finally able to break away from Mr. Buck?

A Well, a friend of mine called my mother and told her what was going on and she came and got me.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 6, 1997
(DEPUTY D. R. WARREN)

* * *

[62]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Sir, please introduce yourself to the jury.

A Deputy D. R. Warren.

* * *

[63]Q Did you have the opportunity to see any of the victims of the murder?

A Yes, ma'am, I did.

Q In particular do you recall seeing the victim by the name of Debra Gardner, a female victim, who was shot in the middle of the street?

A Yes, ma'am.

Q Did you have the opportunity to go up and look at her?

A Yes, ma'am, I stayed with her while she was in the street.

Q What was her condition when you had contact with her during those early morning hours?

A She was doing very bad.

Q What do you mean?

A She had a gunshot wound to her chest and there was a puddle of blood.

Q Did she appear to have problems with her [64]physical condition?

A Yes, ma'am, she was struggling for breath.

Q Did you ever see any of her family members who were around there?

A Yes, ma'am.

Q Who did you see?

A There were three young children, a boy and a girl around there. Then there was a little girl who was three or four. She was running around and crying trying to come over to her mom on the street.

Q She was crying?

A Yes, ma'am.

Q What happened?

A I was the only Deputy on the street so I let her come over.

Q What happened?

A She was very upset but the woman wanted her to be with her so I let her come over. The lady on the street wasn't doing very well.

Q Based on your observations of the woman on the street, what was your opinion about what was going to happen to her?

[65]A She wasn't going to make it.

Q Did the woman on the street make some conversation with the little four-year old girl who came up to her?

A Yes.

Q Did you hear that conversation?

A Yes, she told her she loved her. The little girl was crying and hugging her. She told her it was going to be all right.

Q Then what happened?

A Then I took the little girl away. At that time she passed away.

Q The woman died after she told the little girl that she loved her?

A Yes, ma'am.

Q How did the little girl respond when you took her away? Were you holding her or what?

A I was holding her for awhile, yes.

Q Why were you continuing to hold her?

A Because she wouldn't let me put her down and wouldn't go to anyone else.

* * *

[67]Q When did you first come into contact with Mr. Buck?

A When they told me to transport him to the station.

Q Did you do what you were told?

A Yes, he was placed in my vehicle.

Q While he was in your vehicle, did you look at him and observe his demeanor?

A Yes, ma'am.

Q What was his demeanor at that time?

A He was pretty upbeat and laughing.

Q Did you at any time see any crying or tears on his part?

A No, ma'am, I did not.

Q Did you see him laughing?

A Yes, ma'am, I did.

Q Did you see him talking to any family members?

A Yes, ma'am, I did.

Q Were there other family members who were there around the scene?

A Yes, ma'am, outside of the tape.

* * *

[68]Q What was his demeanor during that trip while he was in the back seat of the patrol car?

A Smiling and laughing.

Q At some point, based on his laughing, did you make a comment?

A Yes, ma'am, I did.

Q What did you say?

A I told him that I didn't think the situation was very funny at all.

Q How were you feeling at that time after what you had been a witness to?

A It was very stressful and sad the way it went down.

* * *

[69]Q What did the defendant say after you made that comment that you didn't think it was funny?

A "The bitch got what she deserved."

Q Did you make any further comment about the fact that you didn't think it was funny?

A Yes, ma'am. I told him that I still didn't think it was a funny situation.

Q What did he say then?

A He said that God had already forgiven him before and that he was going to heaven because he was forgiven.

[70]Q En route to the Police Station, what was his demeanor?

A The same. He was happy, upbeat.

Q During the time that you spent with Mr. Buck that morning, did you ever see him demonstrate any type of tears or remorse for the crime that he had committed?

A No, ma'am.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 6, 1997 (DR. WALTER QUIJANO AND CLOSING STATEMENTS)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

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VOLUME 28 OF 30 VOLUMES

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[101]WALTER QUIJANO

was called as a witness by the Defense and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. EASTERLING:

Q State your name, please, sir.

A My name is Walter Quijano.

Q Mr. Quijano, where have you been the last hour and a half?

A In another court.

Q So you finished up and then came to visit with us?

A Yes.

Q Give the jury an idea of what kind of work you do, what your credentials are, what your educational history is.

A I have a Bachelors Degree in General Psychology and a Master's and Doctorate Degree also in Clinical Psychology. I have completed all the requirements of the Texas State Board of Examiners of Psychologists to practice psychology in Texas.

[102]My work has been both with the public and private sectors. I was a Consulting Psychologist at the Federal Correctional Institution in San Pedro, California, properly called the Federal Corrections Institution at Terminal Island. From there I did some chemical dependency work as a Staff Psychologist at the then Texas Department of Corrections and now called the Texas Department of Criminal Justice Institutional Division. From there I worked for a State hospital in Oklahoma where I did forensic work and was Chief Psychologist.

Then I returned to the private sector doing chemical dependency work in Oklahoma and then in San Antonio. I then was invited back to the then TDC to become Chief Psychologist and Director of Psychiatric Services. I did that for about four or five years and then I resigned that position and represented the State of Texas in the Special Master Theme that surveyed the compliance of [103]the prison system with Court-ordered stipulations. I did similar work for the Federal Court in Florida.

After that I opened a full-time private practice in Conroe. I do much criminal work. I do evaluations and treatment for both juveniles and adult probations out of Montgomery County District Courts as well as the 258th Judicial District. I do some work for the Texas Rehabilitation Commission doing vocational as

well as disability evaluations. I do some work for DPS. I also have private clients coming from various referral sources.

Q How many years did you work for the Texas Department of Corrections which is the prison system in Texas?

A I did as an employee for five years, and I continued to do some work for them on a case-by-case basis depending Court-ordered evaluations.

Q Were you appointed by Judge Collins of the 208th District Court to do an evaluation on the defendant Duane Edward [104]Buck?

A Yes, I got an order to perform an exam on Mr. Buck.

Q Are you paid by the County to do this work?

A Yes.

Q Have you been appointed in other cases over the years since you've been in private practice?

A Yes.

Q Can you give us a general estimate of how many capital murder cases that you've been appointed to evaluate?

A About seventy.

Q About seventy?

A Yes.

Q Have you also worked for the State of Texas and District Attorney's Offices throughout the State evaluating defendants and testifying in their behalf also?

A Yes.

Q Can you give us an estimate of how many times you've testified for the State of Texas?

[105]A It's running about even. I keep track of that because I get that question real often, so it's about fifty-fifty.

Q Did you do a forensic psychological evaluation and some testing on Duane Edward Buck?

A Yes.

Q Where was that done?

A At the Harris County Jail.

Q Can you tell us some of your behavioral observations first about Mr. Buck?

A He was very cooperative. There was nothing unusual with our conversation or his demeanor during the evaluation. I did not see any thinking disorder or emotional disorder. I saw some poor insight, but overall it was a normal conversation except for the fact that the insight was poor and he had a excessive obsession with the Bible and Jesus and what we call jail house conversion.

Q When you were conversing with him in doing your observations, were you also looking for any symptoms of mental [106]illness or, I guess, insanity or what the lay person would call craziness? Were you looking for things like that?

A Yes, you interview and keep an eye on any thinking disorder, any emotional disorder, and then any personality disorder.

Q You didn't see any of those things?

A No thinking disorder, no significant emotional problems, but I recognized a personality disorder.

Q Let's talk about that.

Q What did you recognize?

A He has what is called a dependent personality disorder.

Q Would you explain that?

A A person with a dependent personality disorder is one who in one sense is selective in their relationships that they develop, but once they develop the relationship, they hang on to it even when the relationship is over. It is difficult for them to disengage and they will do extraordinary things to hang on to the relationship. These individuals [107]can become very extreme in wanting to maintain that relationship and sometimes go to the point of thinking if I cannot have you, nobody else can.

Q You developed a history of his relationship with, for lack of a better word, his common-law wife Vivian Jackson, where he had a child; is that correct?

A Yes.

Q Were you also aware of the relationship that he had with the deceased in this case, Debra Gardner?

A Yes.

Q Of course, you were provided the facts from the police report and from me concerning how the murder occurred on Puerta Vallarta, correct?

A Yes.

Q So all of this evaluation and the symptoms you saw, all of that was developed from your evaluations as well as the facts of this capital murder, correct?

A Yes.

[108]Q He showed no signs of insanity to you; is that correct?

A No, not in the legal sense.

Q Now, the defendant's personality disorder that you've described, is that an Axis I disorder?

A It is an Axis II disorder.

Q For the jury's information, what is Axis I and what is Axis II?

A Axis I is a psychological problem that is the object of study or object of treatment. So you would have schizophrenia, depression, substance abuse. Those are objects of study or treatment.

Axis II is a personality style or personality disorder of a person that would interact with Axis I. Many times you treat Axis I disorder and the treatment doesn't work. Chances are there's a personality defect that's interfering with your treatment and you have to address the Axis II disorder first.

Q On your Clinical Impressions on Page 6 [109]of your report, what's the Axis I diagnosis that you have?

A The Axis I was alcohol dependence which was in remission because he was in jail, cocaine dependence which was in remission because he was in jail, but those were the Axis I impressions.

Q Are you familiar with the capital murder punishment issues that jurors are given in a capital murder case at the punishment phase?

A Yes.

Q The first that the issue has to decide is whether the State has proven beyond a reasonable doubt that there's a probability that the defendant would engage in future acts of violence which would constitute a continuing threat to society.

You're familiar with that issue, aren't you?

A Yes.

Q I want to talk about that with you for a moment. I'm going to ask your professional opinion regarding Mr. Buck [110]in relation to that issue.

If we have an inmate such as Mr. Buck who is sentenced to life in prison, what are some of the factors, statistical factors or environmental

factors that you've looked at in regard to this case?

A Number one, among the statistical factors we know to predict future dangerousness is the fact of the crimes. You have to look to see if the person has in the past been assaultive or aggressive, chances are he will be in the future.

Age, the younger the person, the more aggressive and violent a person is. The older a person is, over the age of thirty or in the thirties, the assaultiveness decreases to the point whereby age fifty years old, there's less than one percent of violent acts committed by senior citizens.

Sex. The male for some strange reason is more violent than a female and more assaultive.

[111]Race. It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System.

Social-Economics. The poorer the person, the more likely they are to be violent. There is less violence in the upper social economic levels. The more stable the employment, the less violent the person is.

Substance abuse. The more substance abuse there is, the more violent a person is.

Those are the statistical factors in deciding whether a person will or will not constitute a continuing danger.

Q If you have a defendant such as Duane Edward Buck that has no prior violent offenses, is it true that there would be less of a probability that he's going to be dangerous or commit acts of violence in the future?

A True.

Q Let's talk about environmental factors [112]if he's incarcerated in prison. Let's talk about things such as the availability of victims and things like that. Explain that in terms of probability to the jury.

A The availability of victims means the broadness or narrowness of the victim pool. If the victim is randomly selected, then the more dangerous the person is because there is no predictability as to who the next victim is. The narrower the victim pool, the less dangerous the person will be in the future.

In this particular case the victim is not random, it's narrow, and there is a pre-existing relationship. It was, for lack of a better term, a husband and wife difficulty that is unlikely to be repeated. In prison there is, of course, a narrow victim pool. A sex relationship that this person

is prone to have will not be pleasant in prison. There will not be wives or girlfriends In prison.

[113]There are other potential victims in prison like other inmates, civilian staff, male and female guards, nurses, teachers and so forth. Those are potential victims, but in this particular case the probability of developing a dependent relationship with them would be very small, and those potential victims in prison are more alert to the danger and are less likely to be victimized than in free society where the victims are just victims of crime.

Q You were also provided with some data or some history on Mr. Buck in relation to how he reacts in custody. Isn't it true that the records from the County Jail as well as from the prison system --

MS. HUFFMAN: I would object. He's asking for this witness to testify from hearsay.

MR. EASTERLING: That's what he's expected to do. They evaluate reports and form opinions. It's an exception to [114]the hearsay rule.

THE COURT: Lay your groundwork.

BY MR. EASTERLING:

Q You have been provided data and some records and information on Duane Buck's behavior while he was in the jail and in prison; is that correct?

A Yes.

Q When you looked at that information and talked with me about the information, you determined whether or not he had had any disciplinary problems, didn't you?

A Yes.

Q And he hasn't had any disciplinary problems in the County Jail or in the Texas Prison System; isn't that correct?

MS. HUFFMAN: I'd object to the hearsay.

THE COURT: Sustained.

BY MR. EASTERLING:

Q You used some data to determine whether or not he would be a threat from his [115]behavior in prison, correct?

A Yes.

Q What did you determine that from?

A From the disciplinary records he has no assaultive incidents either at TDC or in jail.

Q What does that tell you?

A Number one, that's a good sign that this person is controllable within a jail or prison setting. He has demonstrated that to be so. Some people do well from an open environment and some people do well in a restricted environment. This person seems to have adjusted to the structures of the prison and has shown himself to be not assaultive there.

Q So if Duane Buck was sentenced to life in prison, do you have an opinion about whether there's a probability that he would commit criminal acts of violence that would be a continuing threat to society?

A The probability of that happening in prison would be low.

Q Let's talk about whether or not there's [116]any differences in your research between someone who does a small or short prison sentence compared with one who is sentenced to life in prison. Are there any differences?

A Short-termers are more disorderly than long-termers. People who are serving shorter sentences are more rebellious. They create trouble in the prison system, mischief, fighting. The long-term prisoners or life-termers constitute a good subsection of the prison system. They, in the words of the correctional people, know how to do time.

Q Is there a disciplinary system within the prison system that effectively controls inmates?

A Yes.

Q Would you briefly describe that to the jury?

A There are two or maybe three systems. The informal system is there's always somebody bigger than you.

The second system is one that we [117]call a court. The court is a disciplinary committee inside the prison system made up of officers and other prison employees.

There is a third system that is used if they commit felonies inside the prison. There is a special prosecution inside the prison system that prosecutes felonies committed in the prison.

MR. EASTERLING: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

BY MR. EASTERLING:

Q Let me show you what's been marked Defense Exhibit No. 1, Mr. Quijano. I'd ask you if you recognize that?

A Yes.

Q What is that?

A It's a copy of my psychological evaluation of the defendant.

Q The defendant in this case?

A In this case.

Q Is it a true and accurate copy of your [118]findings and your report on Duane Edward Buck?

A Yes.

MR. EASTERLING: I'd tender the exhibit to State's Counsel and ask that it be admitted in evidence.

MS. HUFFMAN: Your Honor, I would object to this as being hearsay.

THE COURT: Approach the bench.

(The following proceedings are held at the bench outside the hearing of the jury.)

MR. EASTERLING: This is not hearsay, Your Honor. It's his work.

THE COURT: I've never even seen it.

MR. GUERINOT: If her objection is hearsay, she's [119]right. We need to prove up the predicate for business records and then reoffer it and then see what she has to say.

MS. HUFFMAN: I'd like to look at it. I need to read it.

(The following proceedings are held in the hearing of the jury.)

THE COURT: I've sustained your objection.

BY MR. EASTERLING:

Q Dr. Quijano, who prepared this report?

A I did.

Q What time did you do so?

A I completed the report on March the 8th of 1997.

Q Did you make the entries in this report from your own personal knowledge?

A Yes.

Q Are you the custodian of these records?

A Yes.

[120]Q Have you kept these records in your possession since you made the entries?

A Yes.

Q Were the entries made at or near the time or immediately following your evaluation of Duane Edward Buck?

A Yes.

Q Have there been any changes or deletions or alterations from your original personal report that you brought in your briefcase today?

A No.

MR. EASTERLING: I'd make the same offer, Your Honor.

MS. HUFFMAN: He's offering a document I've never seen before.

THE COURT: Ladies and gentlemen, I'm going to send you to lunch. The Deputy is going to take you to lunch.

Remember you cannot discuss anything about the case at all. Does everyone understand that? You're excused

* * *

[145]explain or support the expert's opinion or inference, the Court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion.

I make that finding that admitting them would outweigh any probative value they may have as explanation or support of the expert's opinion.

MR. GUERINOT: And we would object to that most respectfully.

THE COURT: Bring the jury out.

(The following proceedings were had in the presence of the jury.)

MR. EASTERLING: I'll pass the witness, Your Honor.

[146]CROSS-EXAMINATION

BY MS. HUFFMAN:

Q Sir, how are you today?

A Fine, thank you.

Q Dr. Quijano, you've testified here in Harris County before, have you not?

A Yes.

Q And in this case you're being paid for your testimony; is that correct?

A Yes.

Q In fact, right before you testified in this case you were testifying for the Defense in a serial rape case down the hall; is that correct?

A Not serial rape.

Q What kind of case was it?

A A rape case.

Q How much are you being paid for your testimony today?

A I'm not paid for my testimony. I'm paid for my time.

Q How much are you being paid for your time?

A I charge one hundred fifty.

Q Dollars?

|147|A Dollars.

Q For what?

A Per hour.

Q Approximately how many hours have you got up to this point at almost 3:00 o'clock in this case?

A It's been since 12:00 o'clock.

Q So prior to your testimony here today, you have previous time in this case?

A Yes, the evaluation.

Q When did that evaluation occur?

A The actual interview was February 14, 1997, and I finished writing the report on March 8th.

Q How many times did you meet with the defendant Duane Buck?

A Just one time.

Q What was the time period you spent with the defendant?

A How long I spent with him?

Q Yes.

A Two and a half hours.

Q So all your conclusions and all the opinions that you have given to this jury are based on a two and a half-hour [148]interview with the defendant; is that true?

A Some testing and some eyewitness statements.

Q So you have reviewed some eyewitness reports given to you by Mr. Guerinot?

A Mr. Easterling.

Q And then you interviewed the defendant?

A Yes.

Q Did you interview him in the Harris County Jail?

A Yes.

Q What type of facilities did you interview him in? What type of room was it?

A It's a booth with Plexiglas between us and a small speaker screen.

Q It's kind of like a closet, isn't it?

A Yes.

Q You're surrounded by concrete and it's real loud in there?

A Yes.

Q It's difficult to hear who you're conversing with; is that correct?

A Yes.

[149]Q Would you say it's probably the worst situation or circumstances in which to conduct a clinical interview?

A Yes. I prefer the old jail.

Q But in the new jail that's the way it's set up?

A Yes.

Q The information that you used to complete your report and to give your opinion to this jury is based a lot on your interview with the defendant; is that correct?

A Yes.

Q Now, you testified that you administered some tests to him. Did I hear you say that?

A Yes.

Q What type of tests did you administer to him?

A It's called the Millon Clinical Multiaxial Inventory Two.

Q Inventory Tool?

A Two, number two.

Q What is the purpose of that test?

What's the objective?

[150]A This test is for mainly to measure the different personality styles. That's its most useful use. It can also give some indication of major psychiatric disorders and substance abuse, but it's primary tool is to determine or help determine personality style, personality disorder.

Q The manner in which the test is administered, are you asking him questions and he responds verbally, or does he have to write something?

A He has to answer true or false so it's a paper and pencil test.

Q So the test is purely self-supporting in that whatever he tells you, that's what you go with?

A That's correct. True.

Q There's no way to back up what he says? You don't interview other people or other witnesses to verify what he has told you; is that correct?

A Once the results are in and it gives you some impressions, you have to judge that against the clinical interview and [151]historical background to see if it makes sense. Then you either accept the test or reject the test.

Q So you make a judgment call in that regard?

A Yes.

Q Do you have a copy of that test with you?

A Yes.

Q May I see it, please?

A Yes.

Q Dr. Quijano, just to give the jury an idea what kind of questions that they're asked, I'd like to go through some of this.

Is this a common question? "I always follow my own ideas rather than doing what others expect of me." True or false.

Is that one of the questions?

A Yes.

Q "I always feel like I'm not wanted in a group."

Is that a question?

A Yes.

[152]Q "I enjoy doing so many different things that I can't make up my mind what to do first."

A That's also a question.

Q "I think I'm a very social and outgoing person."

Is that a question that you ask?

A Yes.

Q "I have a talent to be dramatic."

A Yes.

Q "I think I'm a special person which deserves special attention from others."

These are some of the questions that you said you asked?

A Yes.

Q "I was on the front cover of several magazines last year."

A Yes.

Q "I feel very often that I lose my ability to feel any sensation in parts of my body."

A Yes.

Q "I use my charm to get the attention of other people."

Is that a question?

[153]A Yes.

Q "For some time now I've been feeling very guilty because I can't do things right anymore."

Is that a question?

A Yes.

Q "Many people have been prying in my private life for a year."

Is that a question?

A Yes.

Q "I often get angry with people that do things slowly."

A Yes.

Q These are pretty much the nature of the questions that you go through with them? I see there are a hundred and seventy-five of those questions; is that correct, sir?

A Yes.

Q After you've gone through about a hundred and seventy-five of those general type of questions, do you often feel you have a pretty good handle on the person, or enough of a handle on the person to make the type of diagnosis [154]that you have made?

A It gives you some tips or ideas as to the direction to go in and then you confirm with your clinical data.

Q Your clinical data being what?

A Interviews, histories, eyewitness statements.

Q Of course, that all comes within the time period that you've told the jury that you have spent on the case?

A Yes.

Q And that's based on a synopsis from the Defense about their version of the facts of the case; is that correct?

A Yes.

Q Are you aware of any determination by the American Psychological Association where they have determined that it is unethical for a

psychiatrist to testify in a capital murder case about the future dangerousness of the defendant?

A No, that's not true.

Q You disagree with that?

A That is not true. The American Psychological Association does not [155]control psychiatrists. That statement is by the American Psychiatric Association.

Q Here's what I asked you. I said the American Psychiatric Association. That is my question.

A If that is your question, then it is true that the American Psychiatric Association has made that statement. The American Psychological Association has not made that statement.

Q That's not the question I asked but thank you for clarifying that.

MR. EASTERLING: Excuse me, Judge, but the record will show that she did say the American Psychological Association. Probably wasn't intentional but that's how she asked the question.

Q In any event, sir, let's move on. I'd like to ask you some questions from your report that I've had a chance to look over during the lunch hour.

You and I have never spoken [156]before you came in to testify today; is that correct?

A No, we haven't.

Q In fact, is it true that the State of Texas didn't know in advance that a Defense expert was going to testify one way or another in this prosecution; is that correct?

A I don't know. Sometimes they know and sometimes they don't because I get calls from prosecutors sometimes before I testify.

Q In this case you and I have not spoken?

A No, we haven't.

Q I have a few questions about your report that I would ask you to explain to me, if you don't mind. You made the comment that the defendant appeared to be of questionable reliability as an informant.

Was that based upon your general impression of the defendant or on something that didn't pan out from his test as opposed to what you knew about the facts of the case?

[157]A It was just the way he described his situation to me. Some of his version did not make sense.

Q So you had some questions about that?

A Yes.

Q You also mentioned that through the administration of the tests that it appeared that he had magnified the level of experienced illness. What does that mean?

A In that test we discussed in some of the questions that you read, there is a mechanism built into the test to measure the degree in which the respondent either pulls too much appearing too sick or pulls too much to feeling too well, too healthy. So on one side you have exaggeration and on the other side you have minimization. This particular respondent showed some exaggeration of symptoms.

Q Of course, at the time the defendant is speaking with you in the jail setting, he knows because you've informed him that you're interviewing him for [158]purposes of making a determination about your opinion as to his future dangerousness; is that correct?

A Yes.

Q Certainly the defendant knows that at some point in the future he's going to go to trial, right?

A Yes.

Q And at some point you're going to testify before a jury about your opinion, correct?

A Yes.

Q Is that a fair statement?

A Yes.

Q Looking at your report regarding the future dangerousness issue and the statistical factors including when you analyzed his past crimes, I believe you stated that this was non-contributory, correct?

A Yes.

Q I believe or I'm assuming you testified to that because you thought all of his past offenses were non-violent, correct?

A True.

|159|Q Is that based on self-reporting and maybe a synopsis of the Defense's notes?

A Mostly self-reporting.

Q If you were informed that the defendant in fact had a history of abuse towards women and had been assaultive and combative and had threatened women with weapons before, would

that alter that factor under this statistical factor category?

A Yes.

Q So would that increase the probability then of future dangerousness if that were a factor that you would consider?

A That would increase the probability with that population of victims, yes.

Q Now, you also mentioned that it was your opinion that as a person becomes older that they are less likely to commit violent crimes. Is that true?

A Yes.

Q Isn't it true that even though it may be less likely that it is a fact that people of a greater age than thirty-three do in fact commit extremely [160]violent crimes?

A Yes.

Q So you can't rule that possibility out that an older defendant would commit violent crimes, correct?

A No, we are talking about decreasing probability and not impossibility.

Q You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?

A Yes.

Q Now, as far as the socioeconomic factor, I believe you said that the report of his working stability was self-reporting?

A Yes.

Q Which decreased the probability, correct?

A Yes.

Q What if you had information that in fact that the defendant wasn't a steady [161]worker, that he worked for someone who paid him in cash, that he worked only sporadically. Would that increase the probability more so than you initially stated in your report?

A The second sentence says unstable by witness report because one of the witness' statement said that he refused to work.

Q So that increases it?

A Yes.

Q Let's talk about environmental factors. In your report you talked about the availability of victims, that the victim pools become smaller in a prison situation.

A Yes.

Q Would you agree with me though that in fact there are victims available in the prison population?

A Yes.

Q Without a doubt that there are crimes that occur in the prison population, correct?

A Yes.

[162]Q You worked in TDC yourself for several years, correct?

A Yes.

Q Certainly you've been aware of instances where an inmate was killed by another inmate, correct?

A Yes.

Q And incidents of guards being killed by inmates?

A Very, very seldom, but it has happened.

Q Other people who are in the prison system for various reasons have been killed before; is that true?

A Yes.

Q So you can't tell this jury that violent crimes do not happen in prison because in reality it does occur, correct?

A I'm not telling the jury that it doesn't.

Q Also you mentioned earlier that there is a prosecution --

A Unit.

Q Thank you very much. That a prosecution unit is set up to prosecute people who commit crimes in prison. Of course, [163]what happens is that when they are prosecuted and found guilty and are punished, they're sent back to prison, right?

A Or remain in prison.

Q That's what happens. They're in prison and they commit a crime and they're prosecuted and they go back to prison, right?

A Yes.

Q Let's talk about the factor of availability of weapons which is also one of the factors that you say would increase probability. Is it true that weapons are available in prison?

A Yes.

Q Have you had occasion during your time working in the prison system to see an almost incredible variety of weapons that can be fashioned by inmates in prison?

A Yes.

Q In fact, they're almost ingenious in what they can come up with and what they can use to make a deadly weapon; is that [164]not true?

A Yes.

Q They can use toothbrushes, toothpicks, and fashion all kinds of things that they use to injure, assault, or maim other people; is that correct?

A Yes.

Q Let's talk a little bit about drugs and alcohol in prison. You have that as an increased probability and that's because, unfortunately, there are drugs available in the Texas Department of Corrections, correct?

A Yes.

Q And it is a known fact, however it gets in there, that there is a network of all kinds of illegal and illicit substances in the Texas Department of Corrections, correct?

A Yes.

Q You talked about clinical factors that you consider when you make the assessment of a continuing threat and the dangerousness issue. You could not give an opinion basically because of [165]insufficient data from the defendant's self-reporting; is that correct?

A From his version, not sufficient data. From the eyewitnesses, it appeared deliberate.

Q So the more information you would know about the time period, the thoughtfulness the defendant put into committing his crime, or let's just call it the premeditation factor for lack of a better word, that went into it, the number of intentional acts it took to perpetrate his crime, all those are important factors to consider when determining the probability for future dangerousness, correct?

A Yes.

Q So the more deliberate the act, the more thought that went into the act, the more awareness of the

result of a person's act, the less impulsive the act, the more likely the person would be a danger and violent in the future?

A Yes.

Q Would that be a fair statement?

[166]A Yes.

Q The lack of remorse, the fact that a person showed very little or absolutely no remorse for the results of his action even for an extremely violent act, would that show that that person has a greater likelihood of being a threat in the future?

A Yes.

Q Talking about post-conduct behavior, things he did after he committed the crime, you have a category called fun. I don't know if that's a standard category or whether it applies in this case or not. I'm not sure. You made a notation about the fact that you had information that the defendant was laughing. If you had information that the person thought it was quite humorous, the crime that he committed, which was an extremely violent and heinous act, and even after seeing the result of his handiwork with people bleeding, people screaming, children crying, children running over to their [167]mother and hugging her before she died, would that indicate

to you that that person with no remorse would have a greater probability of being a danger in the future?

A Yes.

Q In your report you indicated, and I believe you testified to the jury that you believed that the defendant if incarcerated would not -- there would not be the probability about him being a continuing threat to society. I believe that was your opinion.

A No.

Q That was not your opinion?

A A decreased probability but there is a probability.

Q So there's a probability that the defendant would be a continuing threat to society?

A Right, but he would be on the low end of the continuum. I never rule out any probability.

Q Then there is a probability that he would be a continuing threat to society?

[168]A Yes.

MS. HUFFMAN: No other questions, Doctor. Pass the witness.

REDIRECT EXAMINATION

BY MR. EASTERLING:

Q First of all let's make it clear whether or not you're a psychologist or a psychiatrist and what the difference is so the jury understands. Are you a psychiatrist?

A I'm a psychologist.

Q Tell the jury what the difference is between an psychologist and a psychiatrist.

A About two hundred dollars an hour.

A psychiatrist is a medical doctor. They go to medical school. The last three years they have to specialize and they are trained in psychiatry which is the medical diagnosis and treatment of psychiatric disorders. A psychologist undergoes approximately the same number of years in training but |169|specializes in psychology and does not use medication to treat but uses established psychological principles and not medical intervention.

Q So it's the medical doctors, the psychiatrists from the American Psychiatric Association that don't believe in coming in and testifying in death penalty cases?

A I don't think it's that simplistic. It simply says that you have to examine the person and know the basis of your prediction and that it's not enough to predict. You have to also explain the basis for that prediction so that the trier of facts can give the appropriate weight to your opinion.

Q But the American Psychological Association has never taken the position that there's something wrong with you coming in here and testifying, have they?

A No. The American Psychological Association's guidance is to use existing knowledge, psychological [170]knowledge, the body of knowledge that we have, and apply to the specific questions. It warns us not to exaggerate our opinions or overclaim. That's why I'm very careful to state my opinions in terms of probabilities and not black and white type of assessment.

Q If I would have asked you to do this evaluation and you would have given me the opinion that he was going to be a high risk or there was a high probability, then that would have been the opinion we all would have had to live with, right?

A Correct, because it would have been based on the facts of the case.

Q You didn't give your opinion to me because I wanted you to give that opinion or Mr. Buck

wanted you to give that opinion or Mr. Guerinot wanted you to give that opinion. You gave us your professional experienced opinion; is that correct?

A Correct. Nobody interfered with my opinion nor lobbied me. I wrote my [171]report and I submitted it the way it is.

Q What is the I.Q. of Duane Buck that you know from your testing?

A I did not do the testing myself but the tests from some other psychologist shows 74, I think.

Q Could it be 72 to 74?

MS. HUFFMAN: I'd object to the leading, Your Honor.

THE COURT: Sustained.

BY MR. EASTERLING:

Q If it was around 74, is that on the low or high end of I.Q.?

A That would be what is called the low end of the borderline range.

Q Do you feel that had some effect on what Ms. Huffman pointed out, that he was a questionable informant about information and details?

A That opinion came from his report to me that he could not remember details up to a certain point and that is where I said that his reliability is questionable, the lack of recollection of details [172]after a certain point.

Q You then used facts that you learned from the police report and the witnesses' statements about the details of the murders, correct?

A Yes. The witnesses' statements were detailed enough to pick up where he left off. It was very beneficial for me to read that and to make a judgment in this case, and the witnesses' statements were responsible for many of the favorable judgments I made of this defendant.

Q Now, you were aware that there was some history of some alleged assaultive behavior to a woman. You were aware of that. You are still aware of it today.

Does that change your opinion in any way concerning the fact that he's at the low end of probability of committing future acts of violence?

A No, my opinion would be the same. Many of these factors that are true to him now would not be true in prison. When you're deciding on a person's dangerousness, you not only look at the [173]factors that contribute to dangerousness but you also look at where the people will be and

the facts of that environment. You look at those factors and know that many of those factors will be controlled in prison. They cannot be ruled out completely but they are controlled much better in prison than in free society.

Q It's very unlikely that he would have a relationship with a woman in the penitentiary; is that true?

A That would be unlikely.

Q And that would reduce the victim pool that you talked about, correct?

A Correct. Particularly in his case where the assaulted victims were always involved in a romantic relationship. When that victim pool is removed, the probability of him being assaultive towards other people as shown by his previous prison record would be expected to be good.

MR. EASTERLING: May I approach the witness, Your [174]Honor?

THE COURT: Yes, sir.

BY MR. EASTERLING:

Q You talked about weapons with Ms. Huffman, about weapons in prison. Do inmates walk around with .22 rifles in prison?

A No, they are no guns in prison.

Q Do they walk around with .12 gauge shotguns in prison?

A No.

Q The kinds of things she's talking about is like an inmate getting a fork from the cafeteria and filing it down and making it into a little knife. That's the kind of thing she's talking about, correct?

A There are no more forks, so it's toothbrushes and pens and bones. There are no more forks.

Q Does Duane Buck have any history of using a knife or that type of deadly weapon with anybody?

A No, not when he was in prison and in [175]jail.

Q In fact, there is no data or record indicating that Duane Buck has ever used a knife or a toothbrush or a razor blade all the time that he was in the County Jail or in TDC, correct?

A True.

Q Ms. Huffman talked to you about there being no remorse immediately after the crime. Let me talk to you about your opinion about that. If the defendant cried in open court when the witnesses were testifying, do you have an opinion about whether or not that's remorse?

A Yes.

Q What is that?

A It's remorse.

Q That, of course, would decrease probability under all the facts that you talked about concerning future violence?

A Yes.

Q To make sure that the jury understands, you're saying that it's at the very low end of probability that he would commit any criminal acts of violence in the [176]prison population where he would be incarcerated; is that correct?

A Yes.

Q You realize that the issue they have to decide, the jury has to decide, is the phrase beyond a reasonable doubt in front of probability in that issue, correct?

A Yes.

MR. EASTERLING: Pass the witness, Judge.

MS. HUFFMAN: No questions.

(At this time the witness is excused from the courtroom.)

* * *

[239]right to proceed first and last.

ARGUMENT ON BEHALF OF THE STATE

BY MS. HOOD:

Ladies and gentlemen of the jury, you've heard a lot of evidence in the second phase of the trial. My job at this point in time is to explain what some of that evidence means. Then I'm going to sit down and Mr. Easterling will address you, and then Ms. Huffman and Mr. Guerinot will address you.

I want to talk with you right now about these documents that have been admitted in evidence through the fingerprint person that was here today, Deputy Schield. You're welcome to take any and all of this back into the jury room with you. I just want to touch upon some of the things we think are important.

State's No. 66 is a Penitentiary Packet that is a record of this defendant's trips to the Texas Department of Criminal Justice. It's [240]been proven up to you, but there is a photograph in here and his fingerprints are in here. Most importantly, it reflects two Judgments that were issued against him. You can take a look at this if you care to, but I'm going to tell you briefly what these documents say.

In Cause No. 555487 there is a Judgment for a delivery of cocaine case where he received ten years in the Texas Department of Criminal Justice. What also is important regarding that conviction -- what I'd like to do is refer to State's No. 70 which is being marked for demonstrative purposes only. It's not in evidence. It's not being admitted. It's a record of what we have here on the table. Let's look at this first. What you have in that file is a Judgment and Sentence for carrying a weapon, an unlawful carrying of a weapon case. The offense was committed March 1, 1989. The date on the Judgment is March 16, 1989. He received four [241]days in the Harris County Jail and a fine.

You will note that soon after there was a possession of a controlled substance case. The date the offense was committed was March 25, 1989, and on March 27, two days after that, he appeared in court and received four years deferred adjudication-type probation for that offense.

You will notice that after he received his deferred adjudication probation that he committed an offense. That happened on October 9, 1989, failure to identify himself to a police officer. For that offense, on November 3rd, 1989, he received thirty days in jail. However, go back to the line ahead of it and you will see that at that time he was adjudicated, taken off of the probation that

he received, and on November 1, 1989, he received three years in the Texas Department of Criminal Justice.

If you look forward and go down [242]to the bottom line and see the delivery of controlled substance case. He committed that offense on February 12, 1989, and on February 27, 1990 that he received ten years in the Texas Department of Criminal Justice.

State's No. 70 is for demonstration purposes only and is a summary of what these documents show. You're welcome to look at this and what it shows in summation.

State's No. 68 is a Judgement and Sentence in the failure to stop and identify to a police officer. State's No. 67 is a Judgement and Sentence for carrying a weapon case.

Also in evidence, you're welcome to take a look at them, State's Exhibits 59, 60, 61, 62, 63, and 65. You'll recall from the testimony that these are exact duplicates of jail cards, the booking records of the defendant. It will give you a little bit more information regarding this defendant and all the times that he appeared in court.

[243]What we're asking you to do is take a look at these documents, if you care to. You certainly can take them into consideration when you're doing your deliberations in this case. Thank you.

ARGUMENT ON BEHALF OF THE DEFENSE

BY MR. EASTERLING:

May it please the Court, Your Honor, ladies and gentlemen of the jury, the State, family members, all parties involved in this case.

You are going to have to make the most important decision that you've ever had to make in your life. I'll be right up front with you. I am asking you to spare this man's life. The State is going to ask you the opposite. Ya'll knew this was coming and now you've got to make the decision.

I am asking you to spare his life based on the evidence and not upon sympathy or not upon any other emotions [244]that are generated in these kinds of cases but only on the evidence.

You will remember that we talked to each one of you and you said that you would be fair. You said that you would be open-minded. You said that you would answer these issues according to the evidence and whether they were proven to you, and particularly No. 1, that issue which I'm going to be talking to you about. If they were not proven to you, you would do what the law requires you to do. If they don't prove the case by evidence, you've got to answer the issues accordingly.

There's no doubt about it. Everybody in this courtroom feels bad about what happened. Everybody knows it's a tragedy. There were some lives lost and some lives changed forever. Children have been changed forever. There's no disputing that. I don't apologize for Mr. Buck's behavior because it was bad. There's no question about it, but does it fit into the [245]special category where he should be killed by the State of Texas?

The answer from the evidence is no for the following reasons: You've got to look at everything. You've got to keep this big picture in your mind here. We know that the first issue is about trying to determine whether they have proven beyond a reasonable doubt -- the highest burden that we have in this country -- that there is a probability that Mr. Buck will commit future acts of violence that are a continuing threat to society.

Remember it's a plural. It's acts. It's not one act. It's acts, plural acts of violence, and that he is a continuing threat to society. It's not a particular threat but a continuing threat to society.

Have they proven that? The answer is no. They just haven't met their burden of proof. Anybody can say it's possible that something may happen but we can't predict the future. Sure [246]it's possible that in prison Duane Buck may push somebody else. Sure it's possible that in prison

that he may punch another inmate. Sure it's possible that he might get -- what was it they described? They don't have any forks anymore, but let's say he gets something and sharpens it into a weapon and shanks somebody with it. Sure it's possible, but what do we know from the evidence? That it probably will not happen.

Why will it probably not happen? You can look at this and see all of the months and years that he's been in the County Jails and in the prison system and you will not see one single incident of disciplinary problems. Not even cussing a guard is in evidence. Does that tell you something? Of course it tells you something. It tells you that he's controllable in the prison population.

Living in a cage with no freedom, with no say so about where [247]you're going, somebody else telling you what to do, what you're going to eat, when you're going to eat, not ever getting to walk with his kids in the park, not ever getting to do anything outside the walls of the prison barbed wire or brick, that's punishment. Each one of you told us that a life sentence is punishment.

What this tells us about Duane Buck is that he is a common criminal. There is not one single thing in here indicating violence. He was carrying a weapon. I would submit that half the people in Houston do that.

And then he had a possession of drugs, and he didn't tell his right name to a police officer. Is that violence? Of course not.

Possessing drugs, is that violence? Of course not.

Selling a small amount of drugs to an officer, is that a small-time criminal or is that a vicious and violent criminal? He's a small-time [248]street criminal.

Duane Buck can work on tractors in prison. He can make license plates. He can give something back when he's in a structured, protected society where there is no probability that he is going to harm anybody. We know that from his past record. We know that from his character evidence. We know that from his family members and other people who said they were shocked when this happened. We had no idea he was capable of something so horrible. It was a one-time aberration. It was violent. There was no doubt about it, but it's one isolated event in almost thirty-four years of this man's life. That's what they're asking you to answer these questions on in such a way that he would be executed.

What else do we know? They didn't bring in one single police officer out of all these incidents to come in here and say Duane Buck is a bad person, that he was rough with me, that [249]he gave me a lot of problems, that he spit on me, that he

kicked me. There was not one, not one single one. You can imagine all the police that they could have called, all the prison guards, all the Deputy Sheriffs that they have at their disposal to talk to. Believe me, if they could find something, they would have brought them in. That's something you have to look at.

The only person that they brought in was Vivian Jackson. The results of the evidence about the dependent personality disorder that the two experts described, that is, that he can't stand rejection and he's had a bad time with his relationships when they end because he can't let go. We know that. We know that was the setting of what happened out there.

The State can't deny that this case began out of jealousy, that it began out of passion and emotion. He did horrible acts because of it, but [250]they can't deny the fact that he was agitated and the events were clearly provoked and made worse by the atmosphere with everybody talking trash to each other and pulling knives. Debra Gardner pulled a knife on him. I'm not trying to excuse his behavior. I'm not trying to say that, but it is an explanation for his behavior. That's what you have to look at when you're considering these issues. This was a bad family situation that developed and it turned into a tragedy.

I'm sure Ms. Huffman is going to go through these seventeen deliberate steps. He did take these deliberate steps to commit the crime. Nobody's denying that, but he did it all within a short period of time while he was under the influence of this extreme jealous passion that he had. It's never going to happen again, an act of violence is never going to happen that's anywhere close to this, and it's not even probable that he's going to hurt anybody [251]again.

This man will be thirty-four years old in July, a couple of months from now. He's going into prison as a life sentence and he's going to do his time and not bother people. He's going to be punished for it. He'll be suffering. Of course he will be. It's not a country club. It's a cage. It's iron bars. It's handcuffs.

On this issue we brought you two very professional people that were appointed by the Honorable Judge Collins. That's provided for a reason. That's to level the playing field. That's to make it a fair trial. That's to assure due process. You heard from these experts who deal with these people day in and day out over the years. Dr. Quijano testified he worked for the prison system for five years and he's done this kind of thing for years. What is his opinion? He said that there is a very low probability that he would ever commit an act of violence.

[252]That's an expert opinion and you don't have to take it alone to decide this issue. It's just another piece of evidence that shows you that the State hasn't proven it beyond a reasonable doubt. Dr. Quijano is a credible witness and nothing they could do would discredit him.

Dr. Patrick Lawrence is also extremely qualified and very experienced. He has seen thousands of murderers and tells you that no way does Mr. Buck fit the psychopathic murder profile. In his opinion there is also no probability that he would commit criminal acts of violence in the future.

You can't say that you're going to guess that he's going to do it or that he might do it or he possibly could do it in answering this issue. You can't do that. That's not the law. Judge Collins has told you that you are not to be swayed by sentiment, conjecture, sympathy, prejudice, public opinion or public feelings in answering [253]Issue Number One. You answer it based on the evidence, and I would submit that the State hasn't proven it beyond a reasonable doubt. They haven't tipped the scale far enough. The answer under the law and the evidence to Issue Number One is no.

There is another thing I'd like to talk about. With all the resources of the State, they have the right to call in their own experts to come in and say bad things about Duane Buck. They could have called people up here to say that in their opinion

he would commit criminal acts of violence in the future but they didn't do that. It is significant that they didn't do that. You can deduct from this that --

MS. HUFFMAN: I'd object to them making a deduction from something that's not in evidence.

BY MR. EASTERLING:

You can make a reasonable [254]deduction why they didn't bring anybody in here. Use your common sense. It doesn't take a genius to figure out why they didn't have anybody here, does it?

They didn't have one single member of the community, not one person who came in here and said that he had given them a problem in his thirty-three and a half or more years. They could have brought somebody else in, couldn't they? But they didn't. You can use your common sense and figure out why they're not here, can't you?

These experts are independent. They are impartial. They're paid with government tax dollars. They're not paid by me. They're not paid by Mr. Guerinot. They're not paid by this man. Their opinions are valid and they need to be looked at.

If for some reason, and I'd have to respect it, you decide that Issue Number One should be answered

yes beyond a reasonable doubt, then there's an issue that you have to look at. And if [255]you're there in these deliberations, they ask you if there are sufficient mitigating circumstances where life in prison is more appropriate than death.

Now, mitigating can be anything anyone thinks it is. There is no particular definition for it. It could be many factors. It could be the totality of the circumstances. Most of you answered that just one thing wouldn't be enough, but here you have a whole lot of factors. He lost his mother when he was eleven years old in a car accident. His dad went to prison in '73. He was an ex-convict before Duane even got out of High School. His dad has been arrested again and again and again. We have cocaine abuse and we have alcohol abuse.

Then we have the setting of the crime itself, the fact that it was a crime of passion and jealousy. So obviously one of these may not be enough but if you look at the whole picture, if you put it all together, it could be [256]sufficient and we would submit it is sufficient where life in prison would be the more appropriate punishment.

Answering these questions in a way whereby Mr. Buck receives the death penalty isn't going to bring anybody back. It's not going to bring back their mother. It's not going to bring Kenneth Butler back. Nothing is going to change the fact that Phyllis got shot. It won't change anything.

We don't react to crimes that way. We decide them on the evidence. I'd ask you to spare his life based on the evidence. Thank you for your time and attention.

ARGUMENT ON BEHALF OF THE STATE

BY MS. HUFFMAN:

Ladies and gentlemen, I too thank you for the attention that you have paid even at this late hour. My comments are going to be brief today. You've heard all the evidence in the [257]case and now it becomes your job to decide what the fate of this defendant will be. You've all indicated that this is probably the most important decision that you will ever make in your life and I wouldn't disagree with that.

What your job is now is to go back in and reconsider the evidence you've heard and answer those two questions. You as the twelve jurors absolutely will know what the results are going to be based on how you answer the questions. You're not responsible for what's going to happen to Mr. Buck. The State of Texas has certain laws. You twelve people happen to be reasonable people who met the standard to be on this jury in this kind of a case and you are simply fulfilling your duties as citizens, as the jurors in this case, and that's all we're asking you to do. All we're asking you to do is make an objective decision

based on the evidence. You don't have to go back and feel guilty about your decision or [258]feel guilty about what's going to happen to Mr. Buck in the future because you just don't have to feel like that. You go back there and you make your decision based on the evidence. The evidence is overwhelming in this case.

You have two things to consider. First of all, you have to decide if Mr. Buck will be a continuing threat to society. Is he going to commit criminal acts of violence in the future such that he is a continuing threat to society? More specifically, is there a probability that he's going to continue to be a threat to society?

We talked about what probability meant, a probability. We told you that when there is no legal definition, that you use your common sense. A lot of you talked about the fact that it meant more likely than not. Some of you had varying definitions but basically you felt it meant more likely than not.

Every one of you told us that there might be some cases where based [259]just on the evidence, the facts of the capital murder itself, that they could be so overwhelming, so heinous, so violent, so thought out, so premeditated, so blatant, so violent, that they in themselves would cause you to believe that the defendant would be a continuing threat to society. I would suggest to you that this is exactly what you have in this case.

You have even more evidence though because you do have a history in this case. You have a history of trips to the penitentiary, carrying a weapon, a history of being involved in the criminal justice system with no sign whatsoever of being rehabilitated. The defendant was given a chance on probation at some point but he got in trouble again and he went back to prison, served some time in prison and then was out of prison before his sentence was over which you can tell from the evidence that he was out before his sentence was over. Then he's out of [260]prison and he commits a capital murder.

These are the things you know about the defendant that tell you something about his character and his ability to follow the rules and his desire to change himself or rehabilitate himself.

You heard from Vivian Jackson who told you that he abused her, that he threatened her with weapons, that he beat her, and he got away with it over the years through coercion and threats.

What else do you know? You heard from the Defense's own experts that they called who prepared reports to aid you in the defense of this man. You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that the man would commit future acts of violence.

MR. EASTERLING: That's a misstatement of the evidence. He said there was a low probability and not a [261]probability.

THE COURT: You're the fact finders. You heard the evidence.

BY MS. HUFFMAN:

I'm only telling you what I heard. I gave him every opportunity to explain it, to be honest with you, and I thought what he said was that he was at the low range but the probability did exist that he would be a continuing threat to society. You can go back there and discuss what you heard but I would submit to you that's what the man said. He's an expert in the field.

The other gentleman, Dr. Lawrence, he told you that he couldn't make any guarantees.

That's what you jurors are allowed to make your determination on as to whether the probability exists that he would be a continuing threat to society. That's the way the law is set up. If the State wanted to have a panel [262]of psychiatrists and psychologists in here to make that determination, that's what there would be. That is not the law though. The law says that you twelve people are reasonable citizens and you will make the call. You will make the ultimate decision about whether or not a defendant is a continuing threat to society.

We talked about premeditation some too. You heard a lot of evidence that tells you that this defendant premeditated this crime. That's one of the factors that the doctors have said is a serious consideration when determining the probability of future dangerousness. This was a completely premeditated crime. I'm not going to go over in detail with you about these seventeen deliberate steps so I hope you remember that since it was just yesterday, but I want you to think about those marks on the board and think about every step that this defendant took when he made his conscious decision to commit [263]his act.

Think about his lack of remorse which is also another important fact that the doctor told you you could consider in determining future dangerousness. It tells you something about the person.

It's unquestioned that he was laughing about what he had done. You heard Deputy Warren testify that when he was transporting him that he told him that the bitch deserved it. He told you that the defendant said something about the fact that he had been forgiven by God even before he went over there. That tells you something about the person. Certainly that's premeditated because he knew exactly what he was going to do before he went over there. I think that's a pretty scary person who thinks that they can do absolutely anything that they want to do. Does that indicate

to you that that person is a continuing threat to society when they think they have absolution for something [264]before they commit the most heinous crimes you can think of? He thought that he was absolved from that responsibility.

Think about how scary that is. This is what you're dealing with with this defendant. These are the things that you think about when you're determining if he's a continuing threat to society and what your answer should be.

Think about the victims he chose to kill and shoot at that day. The Defense has told you that the motivation for the crime was jealousy and anger. Well, he had plenty of time to think about it. We all have had disappointments in life. We've all probably been jilted by a man or a woman or have been disappointed because something went wrong in our life. That's life. That just happens. That's the way it is. You don't respond in the manner which this man has responded in.

On top of killing those people, [265]he also shoots his own sister, the woman he grew up with, the woman he knew. He knew she had a family. He knew all about her and yet he was the kind of person who could point a gun at her chest, watch her face, pull the trigger, and then go on to commit more acts within just a few minutes.

Think about what kind of a person it took to do that. Think about when he shot Phyllis Taylor. At that time he was a continuing threat to society when he went on to shoot the other people, was he not? He shot Kenneth Butler. After he shot Kenneth Butler was he a continuing threat to society? If Debra were here, she'd vouch for that because then he shot Debra Gardner.

This is a man that made deliberate decisions. Think about this. After you had killed a person, after you had shot someone at close range with a gun we could imagine the type of damage it would do, the person is spitting up [266]blood, gasping for air, and you see the results of your handiwork, saw the results of what he did, and yet he's the type of person that continues his assault. He continues his path to the next victim, to the next victim, to the next victim.

That tells you about this person and is something you should consider when you're determining whether or not he's a continuing threat to society. These are the type of factors that I'm asking you to consider when you make that determination.

You know that if he goes into the general population in prison that he is a risk with alcohol and with drugs. The experts told you that. You also heard from the evidence that alcohol and drugs are available in prison. It's a sad commentary on our system but it's the truth. You know all these

things. You know those risk factors are going to be there. As we have discussed, everybody in society has the right to be [267]protected from this defendant wherever he may go.

He has proven to you that he is going to be a continuing threat. I don't think there's any way that reasonable people can look at this defendant's background and the evidence in this case, and his lack of remorse, and his deliberateness of action, and argue reasonably that he would not be a continuing threat to society. Remember it's only a probability that he will be a threat to society. I think the answer to Question Number One is clearly yes.

Briefly with regard to Issue Number Two, you know your job is to look at all of the evidence. We talked about this on voir dire too. There is simply nothing there. Think about the facts of what this defendant has done, the enormity of his crime, the enormity of what he has left behind, the results of his crime, and you weigh the threat that this man is to society, there is nothing you can find in the evidence that [268]mitigates towards a life sentence for this defendant. It's just not there.

Everybody has had hardships in life. Everyone has had hard times. Probably everybody here has had a parent who has died or someone close to them who has died that made their life sad. Everybody has had bad times. A lot of people

have had a parent or maybe even two parents that did not live up to their expectations. That does not give you a free ticket to kill and it does not excuse your behavior.

Mr. Easterling argues to you about cocaine and alcohol dependency. There is no evidence whatsoever that this defendant was under the influence of any alcohol or cocaine at the time he committed the offense. I believe one witness stated he had a beer in his hand when he first came to Debra's house the first time. That's the only evidence of that. He doesn't get points for that.

Whether he has a cocaine or alcohol problem or otherwise, you may [269]think that because he has been arrested for possession of cocaine. On the other hand, he also sold cocaine. That doesn't prove anything. There's no real evidence of that other than his self-reporting to his expert.

He has low intelligence but he is not mentally retarded. He's around the average intelligence group that you would find in the prisoner jail population according to the expert. You know that if a person is in the lower range of intelligence that they have a higher likelihood of being violent. That's what their own expert told you, so when you weigh that it balances out. He may have a little lower intelligence but he's more likely to be violent.

There is absolutely nothing that's in evidence that would call for you as the jury to give this man some type of break because he doesn't deserve it. He made a lot of choices almost two years ago and he knew the results of what his choices were going to be. He [270]knew the victims. It wasn't anything to do with an impulsive act where he didn't have time to think about what the results were going to be or what the aftermath of his crime was going to be. He knew Debra Gardner. He had lived in the house there with her. He knew that she had children. He knew they were going to be left behind without a mother to raise them and that they'd have to live with different family members. He knew that his sister had children. Maybe he didn't know that much about Kenneth Butler but at least he knew he had a brother. He knew he didn't deserve to die.

He knew when he shot Debra Gardner that she was begging for her life. He knew her own children were watching her and he knew that her own children were begging him not to kill their mother. What kind of man would do that? He knew there were younger children involved that loved Debra Gardner. You heard about the little [271]four-year old girl that the officer believed was also her daughter. He knew that. He knew that she was begging him not to kill her in front of her children, begging for her life, and yet he killed her. That tells you what kind of man he is.

Society encompasses a lot of people. Society has the right to be protected from people like Duane Buck. Cases like this are why the State of Texas has the death penalty because people like Duane Buck make choices in their life. He's done nothing for society. He's a burden to society. You've seen nothing that shows that he can give anything to society. He's given nothing, nothing at all except to kill and leave in his wake a family who grieves. That's all that's left.

I'm asking you to do the job that you've been selected to do. I'm asking you to go back to that jury room and to fairly look at the evidence and look at this man very carefully and [272]think about the acts that he did, the intentional and deliberate acts he committed, and I think in your heart you will find that he deserves exactly what the evidence shows, what it shows you that he deserves, and that is a yes answer to the first issue and a no answer to the second issue. I would ask you to answer those questions in that way.

Thank you very much.

(At this time the jury is retired to deliberate.)

ALL JURY NOTES, MAY 6-7, 1997

REQUEST OF THE JURY, AND REPLY OF THE COURT FILED 5/6/97

Can we talk about parole with a life imprisonment?

/s/ Michael D. Rupe
Michael D. Rupe

[COURT STAMP OMITTED]

Refer to the charge.

Judy Collins

REQUEST OF THE JURY, AND REPLY OF THE COURT FILED 5/6/97

Can we please get a list of all evidence submitted in this case?

/s/ Michael D. Rupe
Michael D. Rupe

[COURT STAMP OMITTED]

There is no "list."

Judy Collins

REQUEST OF THE JURY
FILED 5/6/97

Can we please get the psychology reports submitted today and police records submitted today?

/s/ Michael D. Rupe
Michael D. Rupe

[COURT STAMP OMITTED]

REQUEST OF THE JURY,
FILED 5/7/97

Can we please get the video tape submitted?

/s/ Michael D. Rupe
Michael D. Rupe

[COURT STAMP OMITTED]

PRESS RELEASE, OFFICE OF THE TEXAS ATTORNEY GENERAL, U.S. SUPREME COURT GRANTS STATE'S MOTION IN CAPITAL CASE, JUNE 5, 2000

Office of the Attorney General News Release Archive

Monday, June 5, 2000

US SUPREME COURT GRANTS STATE'S MOTION IN CAPITAL CASE

Case Remanded for a New Sentencing Hearing

AUSTIN - Texas Attorney General John Cornyn today said the United States Supreme Court has granted a request by the State of Texas that the death sentence imposed in the capital murder case against Victor Hugo Saldano be vacated and remanded for a new sentencing hearing. The new trial will concern only the issue of punishment, not the judgment of guilt, which remains intact.

Saldano was convicted in 1996 of capital murder in Collin County for the murder of Paul King. Evidence presented at the trial showed that Saldano and an accomplice used a handgun to kidnap King from a grocery store parking lot. He was taken to a secluded spot on a country road where Saldano fatally shot King five times, including once in the head at point-blank range. Saldano stole Kings wallet and watch.

"There is no doubt of Mr. Saldano's guilt. A jury properly convicted him of capital murder and that conviction remains in place. During the sentencing phase of the trial, there was sufficient evidence submitted to the jury of Mr. Saldano's 'future dangerousness,' justifying the imposition of the death penalty," Cornyn stated. "Unfortunately, however, evidence of the defendant's race was also introduced before the jury by a district attorney as a factor for the jury to weigh in making its determination. This violated Mr. Saldano's constitutional right to be sentenced without regard to the color of his skin."

Cornyn also said, "We've been conducting an audit over the past couple of months. We've identified eight other cases that may be similar. We will release our findings by the end of the week. We will continue to vigilantly monitor all death penalty cases. Our goal is to assure the people of Texas that our criminal justice system is fairly administered."

- 30 -

Contact Mark Heckmann, Heather Browne, or Tom Kelley at (512) 463-2050

PRESS RELEASES, OFFICE OF THE TEXAS ATTORNEY GENERAL, STATEMENT FROM ATTORNEY GENERAL JOHN CORNYN REGARDING DEATH PENALTY CASES, JUNE 9, 2000

Office of the Attorney General News Release Archive

Friday, June 9, 2000

Statement from Attorney General John Cornyn regarding death penalty cases:

"It has been eight weeks since I first identified problems associated with the testimony of Dr. Walter Quijano, an expert witness in the capital murder trial of Victor Hugo Saldano. As I explained in a filing before the United States Supreme Court on May 3, it is inappropriate to allow race to be considered as a factor in our criminal justice system. On June 5, the United States Supreme Court agreed. The people of Texas want and deserve a system that affords the same fairness to everyone. I will continue to do everything I can to assure Texans of our commitment to an equitable criminal justice system.

"After a thorough audit of cases in our office, we have identified eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial.

"Six of these eight cases are similar to that of Victor Hugo Saldano. We have sent letters to opposing counsel and to the local prosecutors involved advising them of our

findings. Two of these eight cases are dissimilar to the Saldano case. In one, the defendant is not a member of a racial group included in Dr. Quijano's statistical model. In the other, the prosecution did not introduce race as a factor.

"In addition, my office has reviewed case files for all executions in Texas since 1982 and we have not found any cases in which a defendant was executed on the basis of this kind of testimony by Dr. Quijano. Also, we have reviewed the cases of all inmates currently scheduled for execution and none of those involves this kind of testimony by Dr. Quijano.

"Additionally, local prosecutors have been advised to review their cases that have not yet reached the attorney general's office."

30 -

Contact Mark Heckmann, Heather Browne, or Tom Kelley at (512) 463-2050

Office of the Attorney General News Release Archive

Friday, June 9, 2000

AUSTIN - Texas Attorney General John Cornyn offers the following information on capital cases that involved Dr. Walter Quijano's testimony using race as a factor to determine future dangerousness.

Gustavo Julian Garcia, Collin County, cause number 366-80185-91
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on December 6, 1991 and sentenced to death. Garcia shot and killed Craig Turski while robbing a liquor store on December 9, 1990, in Plano, Texas.

Garcia confessed in writing to being the shooter. Garcia also confessed to being involved in the capital murder of Gregory Martin on January 5, 1991. Martin was killed during a robbery of a Texaco station in Plano, Texas.

Eugene Alvin Broxton, Harris County, cause number 599-218
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on April 30, 1992 and sentenced to death. In May of 1991, Broxton forced himself into the Houston hotel room of Waylon and Sheila Dockens.

Broxton bound, gagged, pistol-whipped and then shot the couple. Waylon Dockens survived.

Sheila did not. At the punishment phase of Broxton's capital murder trial, evidence was introduced that Broxton had been charged with the capital murders of Gary Stuchwisch on April 6, 1991, Gordon Miller on April 19, 1991 and Albert Krigger on May 16, 1991.

John Alba, Collin County, cause number 219-81215-91
Case status: headed to Fifth Circuit Court of Appeals for review

Convicted of capital murder on May 1, 1992 and sentenced to death. Alba shot and killed his wife Wendy Alba, after breaking into the home of friends where Wendy fled after leaving Alba. Alba also shot Wendy's friend several times, but she survived.

Michael Dean Gonzales, Ector County, cause number D-23,730
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on December 7, 1995 and sentenced to death for killing Manuel and Merced Aguirre. In April of 1994, Gonzales entered the Aguirre's home and stabbed Manuel and Merced to death. A microwave, VCR, camera, pistol, and stereo were found missing. There was no sign of forced entry. Gonzales was arrested 15 days after the murders.

Gonzales later confessed to a jail guard, who was his cousin, that he killed the Aguirres.

Carl Henry Blue, Brazos County, cause number 23,293-272
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on April 13, 1995 and sentenced to death. Blue poured gasoline on Carmen Richards-Sanders and her boyfriend and set her on fire. Blue then forced his way into her apartment and robbed her. Carmen Richards-Sanders later died.

Duane Buck, Harris County, cause number 699-684
Case status: pending in state habeas corpus

Convicted of capital murder in May of 1997 and sentenced to death for killing two people while on a shooting spree in the home of his ex-girlfriend, after an argument. Buck killed his ex-girlfriend, Debra Gardner, in the middle of the street, in front of her daughter. He also shot and killed a friend of Gardner's Keith Butler, who was at Gardner's home. Buck also shot his sister in the chest, who was also at Gardner's house, but she survived.

UNRELATED CASES

Two of these eight cases are dissimilar to the Saldano case. In the Blair case, the defendant is not a member of a racial group included in Dr. Quijano's statistical model. In the Graves case, the prosecution did not introduce race as a factor.

Michael Blair, Collin County, cause number 366-81344-93
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on September 28, 1994 and sentenced to death. Late in the morning on September 4, 1993, Blair kidnapped seven-year-old Ashley Estell from a park in Plano, Texas. Ashley Estell was watching her brother's soccer tournament. Her half-clothed body was found the day after she was kidnapped next to a ditch along a dirt road a few miles away. The cause of death was strangulation.

Anthony Charles Graves, Burleson County, cause number 28,165
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on October 27, 1994 and sentenced to death. Graves, along with co-defendant Robert Carter, stabbed and then burned Bobbie Davis (age 45), Nicole Davis (age 16, who was also shot), Lea Erin Davis (age 5), Brittany Davis (age 6), Jason Davis (age 4, Robert Carter's son) and Denitra Davis (age 9), at their home in Somerville, Texas, on August 18, 1992. Robert Carter was executed on May 31, 2000.

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MEMORANDUM AND ORDER FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (HOUSTON DIVISION) GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S WRIT OF HABEAS CORPUS, JULY 24, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DUANE EDWARD BUCK,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-04-3965
	§	
DOUG DRETKE, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

July 24, 2006, Decided
July 24, 2006, Filed

Memorandum and Order

This case is before the Court on Petitioner Duane Edward Buck's Petition for Writ of Habeas Corpus and Respondent Doug Dretke's Motion for Summary Judgment. Having carefully considered the Petition,

the Summary Judgment Motion, the evidence, and the arguments and authorities submitted by counsel, the Court is of the opinion that Respondent's Motion for Summary Judgment should be GRANTED, and Buck's Petition for Writ of Habeas Corpus should be DENIED.

I. Background[1]

During the early morning hours of July 30, 1995, Harold Ebenezer, his brother Kenneth Butler, Buck's sister Phyllis Taylor, and Debra Gardner all gathered at Gardner's house after a night out playing pool. Buck lived in the house with Gardner on and off over the previous few years, but Gardner and Buck broke up two or three weeks earlier.

Buck banged loudly on Gardner's door and Gardner called "911." Buck then forced the door open and entered the house. He argued with Gardner and struck her. Buck then stated that he was there to pick up his clothes. He retrieved a few things and left.

At about 7:00 a.m., Buck returned with a rifle and shotgun. Upon entering the house, he shot at Ebenezer but missed; Ebenezer fled the house. Buck then walked up to his sister, Taylor, put the muzzle of one of the guns against her chest, and shot her. Taylor survived.

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1. The facts are adapted from the opinion of the Texas Court of Criminal Appeals ("TCCA") on Buck's direct appeal. *See Buck v. State*, No. 72,810 at 2-3 (Tex. Crim. App. Apr. 28, 1999). Any significant divergence from the TCCA statement of facts is noted with a specific citation to the record.

After she was shot, Taylor heard more shots coming from the vicinity of the bedrooms. As she made her way through the house, Taylor saw Butler's body in the hallway. After escaping, Ebenezer also heard two or three more shots fired inside the house. As he came around to the front of the house, Ebenezer saw Gardner walking toward the street with Buck following her.

Devon Green, Gardner's son, hid in the closet after hearing the first shot fired. Shortly thereafter, he heard Buck's voice accusing Butler of sleeping with "his wife," followed by another gunshot. After a short while, Green looked out into the hall and saw Butler leaning against the wall bleeding. Green then ran outside and saw Buck shoot his mother and put two guns in the trunk of his car. Gardner's teenage daughter, Shennel Gardner, also saw Butler in the hallway after he was shot and then went outside and saw Buck shoot her mother. Both Butler and Gardner died from their wounds.

When police arrived, both Green and Ebenezer identified Buck as the shooter. Police subsequently retrieved a shotgun and a .22 caliber rifle from the trunk of Buck's car.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine and unlawfully carrying a weapon. 28 Tr. at 5-28.[2] Vivian Jackson, Buck's ex-girlfriend and the mother of Buck's son, testified that Buck physically abused her and threatened

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2. "Tr." refers to the transcript of Buck's trial.

her with a gun. *Id.* at 30-36. One of the police officers who accompanied Buck after his arrest testified that Buck was laughing. When the officer commented that he did not think the situation was very funny, Buck responded: "The bitch deserved what she got." *Id.* at 62-70.

Buck presented evidence that he is a peaceful, nonviolent, person, that his mother died when he was 12 years old, that he worked as an auto mechanic, and that his father served several jail sentences for non-violent felonies. *Id.* at 76-100. The defense also called Dr. Walter Quijano, a clinical psychologist, as an expert witness. Dr. Quijano opined, based on his evaluation of Buck, that Buck has a dependent personality disorder. People suffering from this disorder can become obsessive about relationships and have a very difficult time letting go after a relationship ends.

Dr. Quijano also testified that several factors can be predictive of future dangerousness. These include, according to Dr. Quijano, past violent behavior, the age and sex of the defendant (with older defendants less likely to be violent in the future, and male defendants more likely than female defendants to be violent), socio-economic status, and history of substance abuse. Dr. Quijano also testified that race is a statistical predictor of future dangerousness based on the fact that Latinos and African-Americans are over-represented in the penal system. Applying these factors to Buck, Quijano testified that Buck's lack of a violent past made it less likely that he would be violent in the future. Based on his selection of victims (a former girlfriend) and his prison disciplinary

record, Quijano concluded that he is unlikely to be violent in prison. *Id.* at 101-20.

Buck also called Dr. Patrick Gordon Lawrence, another clinical psychologist. Dr. Lawrence agreed that Buck has a dependent personality and that he poses a low probability of future violence. *Id.* at 177-206. The jury found that Buck posed a future danger to society, and that there was insufficient mitigating evidence to justify a sentence of life imprisonment. Accordingly, the trial court sentenced Buck to death. 29 Tr. at 278.

The TCCA affirmed Buck's conviction and sentence on April 28, 1999. *Buck v. State*, No. 72,810 (Tex. Crim. App. Apr. 28, 1999). On March 22, 1997, Buck filed a state habeas corpus petition. On December 13, 2002, he filed a successive state habeas application. SH. at 2.[3] On January 23, 2003, the trial court found that Buck's second petition was a subsequent habeas application and ordered the clerk to send it to the TCCA. *Id.* at 18-19. The trial court recommended denying Buck's original petition on July 23, 2003. SH. at 119-27. On October 15, 2003, the TCCA adopted the trial court's findings and recommendation and denied Buck's first application, and dismissed his second application as an abuse of the writ. *Ex Parte Buck*, Nos. 57,004-01, -02 (Tex. Crim. App. Oct. 15, 2003) (*per curiam*). On October 14, 2004, Buck filed this timely federal petition for a writ of habeas corpus.

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3. "SH." refers to the transcript of Buck's state habeas corpus proceeding.

II. The Applicable Legal Standards

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas relief is governed by the applicable provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which became effective April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Kitchens v. Johnson*, 190 F.3d 698, 700 (5th Cir. 1999).

For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this Court may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). Under the "contrary to" clause, this Court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . [the Supreme Court] on a question of law or if the state court decides a case differently than . [the Supreme Court] has on

a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001) (quoting *Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000)).[4]

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Terry Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d

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4. On April 18, 2000, the Supreme Court issued two separate opinions, both originating in Virginia, involving the AEDPA, and in which the petitioners had the same surname. *Terry Williams v. Taylor*, 529 U.S. 362 (2000), involves § 2254(d)(1), and *Michael Williams v. Taylor*, 529 U.S. 420 (2000), involves § 2254(e)(2). To avoid confusion, this Court will include the full name of the petitioner when citing to these two cases.

683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps*, 537 U.S. 1104 (2003). The solitary inquiry for a federal court under the 'unreasonable application' prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254 (d)(2); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied*, 532 U.S. 1039 (2001). The State court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

B. The Standard for Summary Judgment in Habeas Corpus Cases

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies

with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). Insofar as they are consistent with established habeas practice and procedure, the Federal Rules of Civil Procedure apply to habeas cases. *See* Rule 11 of the Rules Governing Section 2254 Cases. In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts in the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). Where a state prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts, however, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness established by 28 U.S.C. § 2254(e)(1) should not apply, it is inappropriate for the facts of a case to be resolved in the petitioner's favor. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Foster v. Johnson*, 293 F.3d 766, 777 (5th Cir.), *cert. denied sub nom Foster v. Epps*, 537 U.S. 1054 (2002); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998). Consequently, where facts have been determined by the Texas state courts, this Court is bound by such findings unless an exception to 28 U.S.C. § 2254 is shown.

III. Analysis

Buck's petition raises eight claims for relief. These are addressed in turn.

A. Informing The Jury About Parole Eligibility

In his first claim for relief, Buck argues that the trial court violated his Fourteenth Amendment right to due process of law by refusing to inform, or allow Buck to inform, the jury of the law concerning Buck's parole eligibility if sentenced to life imprisonment. Buck contends that this unfairly impeded his ability to rebut the State's argument that he posed a future danger to society. In his second claim, Buck argues that this lack of information renders his sentence violative of the Eighth Amendment because it impeded his ability to offer mitigating evidence. In his third claim, Buck argues that the trial court's refusal to permit testimony concerning parole eligibility violated Buck's rights under the compulsory process clause of the Sixth Amendment.

The crux these three claims is whether the fact that a life sentence would make Buck ineligible for parole until he served 40 years in prison was relevant to the issue of his future dangerousness. He argues that his expert witnesses were not permitted to testify that this was a factor in their conclusions that he was not a future danger, and that his lawyers were also not permitted to inform the jury of this part of his experts' analysis.

Petitioner argues that his position is supported by the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). At the time of Simmons' conviction, South Carolina allowed for a sentence of life in prison without the possibility of parole upon conviction of a capital offense. In *Simmons*, the defense sought an instruction informing the jury that life imprisonment would carry no possibility of parole, but the trial court refused. The Supreme Court held that when "the alternative sentence to death is life without parole . . due process plainly requires that [the defendant] be allowed to bring [parole ineligibility] to the jury's attention by way of arguments by defense counsel or an instruction from the court." *Simmons*, 512 U.S. at 169 (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

The *Simmons* court reasoned that when a state imposes the death penalty on the premise that the convicted individual poses a danger to society, the fact that the defendant may receive life without possibility of parole "will necessarily undercut the State's argument regarding the threat the defendant poses to society." *Simmons*, 512 U.S. at 169. To hold otherwise would create a "false dilemma by advancing generalized argument regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." *Id.* at 171.

Simmons addresses very specific circumstances: (1) When the state seeks the death penalty at least in part on the grounds that the defendant will be a future danger to society; and (2) when the alternative to a sentence of death

is a sentence of life imprisonment without the possibility of parole.

> [I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to deny or explain the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Simmons, 512 U.S. at 168-69 (internal quotation marks and citation omitted); *see also, Wheat v. Johnson*, 238 F.3d 357, 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001). While the State did seek a death sentence in this case partially on the basis that Petitioner would pose a continuing threat, the jury's alternative was a parole-eligible life sentence, not, as in *Simmons*, life without parole. *Id.* at 168 n.8.

The Fifth Circuit has repeatedly rejected Buck's claim.

> [T]he Supreme Court took great pains in its opinion in *Simmons* to distinguish states

> such as Texas, which does not provide capital sentencing juries with an option of life without parole, from the scheme in South Carolina which required an instruction on parole ineligibility . [T]he Fifth Circuit has repeatedly refused to extend the rule in *Simmons* beyond those situations in which a capital murder defendant is statutorily ineligible for parole.

Green v. Johnson, 160 F.3d 1029, 1045 (5th Cir. 1998), *cert. denied*, 525 U.S. 1174 (1999); *see also, Wheat*, 238 F.3d at 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001)(finding *Simmons* inapplicable to the Texas sentencing scheme); *Soria v. Johnson*, 207 F.3d 232 (5th Cir.), *cert. denied*, 530 U.S. 1286 (2000)(finding that "reliance on *Simmons* to demonstrate that the Texas capital sentencing scheme denied [petitioner] a fair trial is unavailing"); *Miller v. Johnson*, 200 F.3d 274, 290 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000) ("because Miller would have been eligible for parole under Texas law if sentenced to life, we find his reliance on *Simmons* unavailing")(internal quotation marks and citation omitted); *Hughes v. Johnson*, 191 F.3d 607, 617 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145 (2000); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir.), *cert. denied*, 523 U.S. 1113 (1998)(stating that a claim based on *Simmons* "has no merit under the law in our circuit"); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995), *cert. denied sub nom. Montoya v. Johnson*, 517 U.S. 1133 (1996) (holding that *Simmons* claims are foreclosed by recent circuit authority rejecting an extension of *Simmons* beyond situations in which a defendant is statutorily ineligible for parole"); *Allridge v. Scott*, 41 F.3d 213, 222

(5th Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995)(stating that "*Simmons* is inapplicable to this case"); *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir.), *cert. denied*, 513 U.S. 1054 (1994) (refusing to "extend *Simmons* beyond cases in which the sentencing alternative to death is life without parole").

If these decisions left any doubt that *Simmons* provides no basis for the relief Petitioner seeks, the Supreme Court removed all such doubt in *Ramdass v. Angelone*, 530 U.S. 156 (2000). "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* at 169.

In this case, life without parole was not a possibility. Petitioner faced one of two sentences: Death, or life imprisonment with the possibility of parole at a future date. Therefore, as *Ramdass* and Fifth Circuit precedent make unmistakably clear, Petitioner's claims do not fall within the scope of *Simmons*.

Insofar as Petitioner seeks an extension of *Simmons* to the Texas scheme, this Court is barred from granting habeas relief on that basis by the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). *See Wheat*, 238 F.3d at 361 (finding any extension of *Simmons* to violate *Teague*); *Clark v. Johnson*, 227 F.3d 273, 282 (5th Cir. 2000), *cert. denied*, 531 U.S. 1167 (2001)(same); *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir.), *cert. denied*, 527 U.S. 1055 (1999) ("Relief based on *Simmons* is foreclosed by *Teague*."). In *Teague*, the Supreme Court held that a

federal court may not create new constitutional rules of criminal procedure on habeas review. *Id.* at 301. Thus, even if controlling precedent did not expressly hold that the *Simmons* rule does not cover Petitioner's case, relief would be barred by *Teague*.

Buck also argues, citing *Skipper v. South Carolina*, 476 U.S. 1 (1986), that information about parole eligibility is relevant mitigating evidence because it "might serve as a basis for a sentence less than death." *Id.* at 4. He therefore contends that the trial court's refusal to allow Buck to inform the jury about parole eligibility violates his Eighth Amendment right to present mitigating evidence. The Fifth Circuit, however, has consistently found that the Eighth Amendment does not require that a jury be informed of parole eligibility. *See Tigner v. Cockrell*, 264 F.3d 521, 525 (5th Cir. 2001). Therefore, Petitioner's motion for relief on his first through third claims is DENIED.

B. Ineffective Assistance Of Counsel

Buck argues that the evidence supported a finding that he acted under the immediate influence of sudden passion arising from an adequate cause when he committed the murders. In his fourth claim for relief, Buck argues that his trial counsel rendered ineffective assistance by failing to request a lesser included offense instruction based on this theory.

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

Buck committed the murders on July 30, 1995. The Texas statute defining a homicide committed under the influence of sudden passion as the lesser included offense of voluntary manslaughter was repealed on September 1, 1994. *See* Acts 1993, 73rd Leg., ch. 900, § 1.01. Where the prior version of the statute defined manslaughter as a homicide committed under the influence of sudden passion, the amended version, which was in effect at the time of Buck's crime, defines manslaughter as "recklessly caus[ing] the death of the individual." Tex. Penal § 19.04. Therefore, Texas law did not provide for the lesser included offense on which Buck now claims he was entitled to a jury instruction. Indeed, petitioner admits that this statutory definition of voluntary manslaughter existed only "[p]rior to September of 1994 " Pet. at 47.

Counsel's failure to request a jury instruction unsupported by the law did not constitute deficient performance. "Counsel cannot be deficient for failing to press a frivolous point." *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995); *see also Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("This Court has made clear that counsel is not required to make futile motions or objections."). Therefore, petitioner fails to meet the first prong of the *Strickland* test and his petition for relief on this claim is DENIED.

C. Evidence Of Future Dangerousness Based On Race

Petitioner's fifth and sixth claims for relief relate to testimony offered during the penalty phase by Dr. Walter Quijano, who testified as an expert witness. Buck's counsel asked Dr. Quijano to discuss certain statistical factors relevant to determining whether a defendant poses a future threat to commit criminal acts of violence. Among the factors Dr. Quijano discussed was race. Dr. Quijano testified that "minorities, Hispanics and black people are over represented in our Criminal Justice System." 28 Tr. at 111. The prosecutor revisited this topic on cross-examination. Buck is African-American.

In his Fifth claim for relief, Buck argues that Dr. Quijano's reliance on race as a statistical predictor of future dangerousness, and the prosecutor's references to this testimony on cross-examination and in closing argument, violated Buck's Sixth and Fourteenth Amendment rights to an impartial jury, due process, and

equal protection of the law. In his Sixth claim for relief, Buck contends his counsel rendered ineffective assistance by eliciting this testimony from Dr. Quijano.

Buck concedes that he did not raise these claims either in his direct appeal or on his original state habeas corpus application, though he did raise them in his successive state habeas application. As noted above, the TCCA dismissed the successive petition as an abuse of the writ.

"When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). The Supreme Court has noted that

> [i]n all cases in which a state prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain*, 128 F.3d 900,

902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51), *cert. denied*, 523 U.S. 1125 (1998); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and federalism").

To be "adequate" to support the judgment, the state law ground must be both "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). The Texas Court of Criminal Appeals applies its abuse of the writ doctrine regularly and strictly. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.) (per curiam), *cert. denied*, 515 U.S. 1153 (1995). Therefore, this claim is procedurally defaulted and this Court may not review the claim unless Buck demonstrates cause and prejudice, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

"Cause" for a procedural default requires a showing that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule, or a showing of a prior determination of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). Buck does not argue that cause exists for his default.

A "miscarriage of justice" means actual innocence, either of the crime for which he was convicted or of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). "Actual innocence of the death penalty" means that, but for a constitutional error, Buck would not have been legally eligible for a sentence of death. *Id.*

To show actual innocence,

> [T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986).

The penalty phase evidence showed that Buck had a history of domestic violence, including threatening his ex-girlfriend with a gun, shot his own sister during the rampage that resulted in the murders of Gardner and Butler, showed no remorse for the murders, and laughed when asked about the murders. This evidence was sufficient for the jury to conclude that Buck posed a future danger. Therefore, petitioner has not established that, but-for the allegedly improper testimony, he could not, as a matter of law, be sentenced to death. Because Buck fails to establish either cause for his procedural default nor actual innocence of the death penalty, this Court may not review his Fifth and Sixth claims for relief.

D. Burden Of Proof On Future Dangerousness

In his Seventh claim for relief, Buck argues that the future dangerousness special issue violates the rules of *Ring v. Arizona*, 536 U.S. 584 (2002) and *Blakely v.*

Washington, __U.S. __, 124 S.Ct. 2531 (2004). Specifically, Buck argues that the language of the statutory special issue, requiring the jury to determine whether there is a "probability" of future dangerousness, has the practical effect of reducing the burden of proof from "beyond a reasonable doubt" to a mere preponderance of the evidence, notwithstanding a specific statutory requirement of proof beyond a reasonable doubt.

Buck never presented these claims in state court. The AEDPA requires that a prisoner exhaust his available State remedies before raising a claim in a federal habeas petition.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). As the Fifth Circuit explained in a pre -AEDPA case, "federal courts must respect the autonomy of state courts by requiring that petitioners advance in state court all grounds for relief, as well as factual allegations supporting those grounds. "[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." *Orman*

v. Cain, 228 F.3d 616, 619-20 (5th Cir. 2000); *see* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . .").

Ordinarily, a federal habeas petition that contains unexhausted claims is dismissed without prejudice, allowing the petitioner to return to the state forum to present his unexhausted claims. *Rose v. Lundy*, 455 U.S. 509 (1982). Such a result in this case, however, would be futile because Petitioner's unexhausted claims would be procedurally barred as an abuse of the writ under Texas law. A procedural bar for federal habeas review occurs if the court to which a petitioner must present his claims to satisfy the exhaustion requirement would now find the unexhausted claims procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Texas prohibits successive writs challenging the same conviction except in narrow circumstances. Tex. CodeCrim.Proc.Ann. art. 11.071 § 5(a) (Vernon Supp. 2002). The Texas Court of Criminal Appeals will not consider the merits or grant relief on a subsequent habeas application unless the application contains sufficient specific facts establishing the following:

> (1) the current claims have not been and could not have been presented previously in an original application or in a previously considered application because the factual or

> legal basis for the claim was unavailable on the date the applicant filed the previous application; or
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

Id.

Petitioner does not claim that he could not have presented the claim in one of his previous state habeas petitions because the factual basis for the claim did not exist, or that he is actually innocent. *Ring* was decided on June 22, 2002, and Buck did not file his successive state habeas petition until December 13, 2002. Therefore, Petitioner could have raised this claim in his prior successive state petition, and the unexhausted claim does not fit within the exceptions to the successive writ statute and would be procedurally defaulted in the Texas courts. *Coleman*, 501 U.S. at 735 n.1.[5] That bar precludes this Court from reviewing Petitioner's claim absent a showing of cause for the default and actual prejudice attributable to the default, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Id.* at

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5. Buck also cites *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531 (2004). While *Blakely* was not decided until after the TCCA dismissed both of Buck's state petitions, Buck does not argue that *Blakely* recognized any new substantive right concerning the burden of proof on aggravating factors. Rather, Buck merely argues that "*Blakely* confirms the foregoing *Ring* analysis." Pet. at 64.

750. Buck offers no argument that cause exists to excuse his default, or that he is actually innocent. Therefore, this Court cannot review his seventh claim.

E. Burden Of Proof On Lack Of Mitigation

The Texas capital sentencing statute requires the jury, after deciding that the defendant poses a future danger, to determine whether the defendant's mitigating evidence is sufficient to justify imposing a sentence of life imprisonment rather than death. Tex. Code Crim. Pro. art. 37.071(2)(e)(1). In his Eighth and final claim for relief, Buck argues that the Texas capital sentencing statute violates the rules of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely* because it does not place the burden on the prosecution to prove that the mitigating evidence is insufficient to justify a life sentence.

Apprendi itself rejects Buck's position.

> Finally, the principal dissent ignores the distinction the Court has often recognized, *see*, e.g., *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987), between facts in aggravation of punishment and facts in mitigation. . . . If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a

> judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

Apprendi, 530 U.S. at 491 n.16. The Supreme Court has thus drawn a critical distinction between aggravating and mitigating circumstances in sentencing proceedings. To the extent that some aggravating circumstance is required before the court may exceed an otherwise-prescribed sentencing range, the state must prove those aggravating circumstances beyond a reasonable doubt. Under the Texas capital sentencing statute, the statutory maximum sentence in the absence of proof of aggravating circumstances is life imprisonment. A court cannot sentence a defendant to death unless the State proves beyond a reasonable doubt that there is a probability that the defendant will commit future acts of violence constituting a continuing threat to society. Tex.Crim.Pro. art. 37.071(2)(b)(1). Once the State has proven this factor, the defendant may be sentenced to death.

The sentencing scheme, however, gives a defendant another opportunity to show that death should not be imposed, even though the State has met its burden of proof. The mitigation special issue is, in this sense, analogous to an affirmative defense. *Apprendi* does not

prohibit placing the burden of proof on this special issue on the defendant. The mitigation special issue does not address a factor necessary to increase the maximum sentence; rather, it addresses factors that allow the jury to impose a sentence *less than* the statutory maximum. Therefore, the mitigation special issue does not fall within the scope of *Apprendi*, and Buck is not entitled to relief on this claim.

IV. Evidentiary Hearing

Buck requests an evidentiary hearing. An evidentiary hearing is not required if there are "no relevant factual disputes that would require development in order to assess the claims." *Michael Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that it was "Congress' [sic] to avoid unneeded hearings [sic] in federal habeas corpus"); *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998), *cert. denied*, 526 U.S. 1100 (1999). "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rule 8 of the Rules Governing Section 2254 Cases.

Each of Petitioner's claims can be resolved by reference to the state court record, the submissions of the parties, and relevant legal authority. There is, therefore, no basis upon which to hold an evidentiary hearing on these claims.

V. Certificate of Appealability

Buck has not requested a certificate of appealability ("COA"), but this Court may determine whether he is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898(5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez*

v. Johnson, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.'" *Washington v. Johnson*, 90 F.3d 945, 949 (5th Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). However, "the determination of whether a COA should issue must be made by viewing the petitioner's

arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court has carefully and exhaustively considered each of Buck's claims. While the issues Buck raises are clearly important and deserving of the closest scrutiny, the Court finds that each of the claims is foreclosed by clear, binding precedent. This Court concludes that under such precedents, Buck has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court concludes that Buck is not entitled to a certificate of appealability on his claims.

VI. Order

For the foregoing reasons, it is ORDERED as follows:

1. Respondent Doug Dretke's Motion for Summary Judgment (Docket Entry 7) is GRANTED;

2. Petitioner Duane Edward Buck's Petition For Writ Of Habeas Corpus (Docket Entry 1) is DENIED; and

3. No Certificate of Appealability shall issue in this case.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 24th day of July, 2006.

/s/ Vanessa Gilmore
Vanessa Gilmore
United States District Judge

MEMORANDUM AND ORDER FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (HOUSTON DIVISION) DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FRCP 60(B)(6), AUGUST 29, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DUANE EDWARD BUCK,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-04-3965
	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

Pending is petitioner's motion for relief from judgment (Inst. # 49). Petitioner seeks relief from the judgment of this Court entered on July 24, 2006 (Inst. # 16).

Duane Edward Buck is currently incarcerated on death row in Texas. On July 24, 2006, this Court denied his petition for a writ of habeas corpus. Among the claims

denied were Buck's claims that he received ineffective assistance of counsel when his counsel called as an expert witness Dr. Walter Quijano, who mentioned an issue relating to race during the penalty phase of Buck's trial. Buck further contended that counsel was ineffective for failing to object when the prosecutor asked Dr. Quijano a question raising a racial issue on cross-examination. This Court found that those claims were procedurally defaulted, and the Fifth Circuit denied Buck's request for a certificate of appealability. *See Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir., 2009).

In 2012, the Supreme Court issued its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim. In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Supreme Court held that *Martinez* is applicable to the Texas capital postconviction process. On January 7, 2014, Buck, relying on *Martinez* and *Trevino*, filed the current motion for relief from the judgment of this Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure (Inst. # 49).

I. Background

The facts are not in dispute. During the early morning hours of July 30, 1995, Harold Ebenezer, his brother Kenneth Butler, Buck's sister Phyllis Taylor, and Debra Gardner all gathered at Gardner's house after a night out playing pool. Buck lived in the house with Gardner

on and off over the previous few years, but Gardner and Buck broke up two or three weeks earlier.

Buck banged loudly on Gardner's door and Gardner called "911." Buck then forced the door open and entered the house. He argued with Gardner and struck her. Buck then stated that he was there to pick up his clothes. He retrieved a few things and left.

At about 7:00 a.m., Buck returned with a rifle and shotgun. Upon entering the house, he shot at Ebenezer but missed. Ebenezer fled the house. Buck then walked up to his sister, Taylor, put the muzzle of one of the guns against her chest, and shot her. Taylor survived.

After she was shot, Taylor heard more shots coming from the vicinity of the bedrooms. As she made her way through the house, Taylor saw Butler's body in the hallway. After escaping, Ebenezer also heard two or three more shots fired inside the house. As he came around to the front of the house, Ebenezer saw Gardner walking toward the street with Buck following her.

Devon Green, Gardner's son, hid in the closet after hearing the first shot fired. Shortly thereafter, he heard Buck's voice accusing Butler of sleeping with "his wife," followed by another gunshot. After a short while, Green looked out into the hall and saw Butler leaning against the wall bleeding. Green then ran outside and saw Buck shoot his mother and put two guns in the trunk of his car. Gardner's teenage daughter, Shennel Gardner, also saw Butler in the hallway after he was shot and then went

outside and saw Buck shoot her mother. Both Butler and Gardner died from their wounds.

When police arrived, both Green and Ebenezer identified Buck as the shooter. Police subsequently retrieved a shotgun and a .22 caliber rifle from the trunk of Buck's car.

The case was tried to a jury. The jury found Buck guilty of capital murder at the conclusion of the guilt-innocence phase of the trial.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine and unlawfully carrying a weapon. Vivian Jackson, Buck's ex-girlfriend and the mother of Buck's son, testified that Buck physically abused her and threatened her with a gun. One of the police officers who accompanied Buck after his arrest testified that Buck was laughing. When the officer commented that he did not think the situation was very funny, Buck responded: "The bitch deserved what she got."

Buck presented evidence that he is a peaceful, nonviolent, person, that his mother died when he was 12 years old, that he worked as an auto mechanic, and that his father served several jail sentences for non-violent felonies. The defense also called Dr. Walter Quijano, a clinical psychologist, as an expert witness. Dr. Quijano opined, based on his evaluation of Buck, that Buck has a dependent personality disorder. People suffering from this disorder can become obsessive about relationships and have a very difficult time letting go after a relationship ends.

Dr. Quijano also testified that several factors can be predictive of future dangerousness. These include, according to Dr. Quijano, past violent behavior, the age and sex of the defendant (with older defendants less likely to be violent in the future, and male defendants more likely than female defendants to be violent), socio-economic status, and history of substance abuse. Dr. Quijano also testified that Latinos and African-Americans are over-represented in the penal system. Applying these factors to Buck, Quijano testified that Buck's lack of a violent past made it less likely that he would be violent in the future. Based on his selection of victims (a former girlfriend) and his prison disciplinary record, Quijano concluded that he is unlikely to be violent in prison.

Buck also called Dr. Patrick Gordon Lawrence, another clinical psychologist. Dr. Lawrence agreed that Buck has a dependent personality and that he poses a low probability of future violence. The jury found that Buck posed a future danger to society, and that there was insufficient mitigating evidence to justify a sentence of life imprisonment. Accordingly, the trial court sentenced Buck to death.

The Texas Court of Criminal Appeals ("TCCA") affirmed Buck's conviction and sentence on April 28, 1999. *Buck v. State*, No. 72,810 (Tex. Crim. App. Apr. 28, 1999). On March 22, 1997, Buck filed a state habeas corpus petition. On December 13, 2002, he filed a successive state habeas application. On January 23, 2003, the trial court found that Buck's second petition was a subsequent habeas application and ordered the clerk to send it to the TCCA.

The trial court recommended denying Buck's original petition on July 23, 2003. On October 15, 2003, the TCCA adopted the trial court's findings and recommendation and denied Buck's first application, and dismissed his second application as an abuse of the writ. *Ex Parte Buck*, Nos. 57,004-01, -02 (Tex. Crim. App. Oct. 15, 2003) (*per curiam*).

On October 14, 2004, Buck filed his federal petition for a writ of habeas corpus. This Court denied his petition on July 24, 2006, the Fifth Circuit denied Buck's request for a certificate of appealability, *Buck v. Thaler*, No. 06-70055 (5th Cir. Sept. 25, 2009), and the Supreme Court denied his petition for a writ of *certiorari*, *Buck v. Thaler*, 130 S.Ct. 2096 (2010).

On September 7, 2011, Buck filed a motion for relief from this Court's judgment. This Court denied that motion on September 9, 2011 (Inst. # 31). On September 12, 2011, Buck filed a motion to alter or amend the judgment denying his motion for relief from the judgment. This Court denied that motion on the same day (Inst. # 36). The Fifth Circuit denied Buck's request for a certificate of appealability on September 14, 2011. *Buck v. Thaler*, 452 Fed. App'x 423 (5th Cir. 2011). The Supreme Court denied Buck's petition for a writ of *certiorari* on November 7, 2011. *Buck v. Thaler*, 132 S.Ct. 32 (2011).

The Supreme Court decided *Martinez* in 2012, and *Trevino* in 2013. On January 7, 2014, Buck filed this Rule 60(b) motion.

II. Analysis

In this renewed motion for relief from the judgment, Buck argues that his trial counsel rendered ineffective assistance by calling Dr. Quijano to testify. Buck's counsel asked Dr. Quijano to discuss certain statistical factors relevant to determining whether a defendant poses a future threat to commit criminal acts of violence. Among the factors Dr. Quijano discussed on direct examination was race. Dr. Quijano testified that "minorities, Hispanics and black people are over represented in our Criminal Justice System." The prosecutor asked an additional race related question on cross-examination. Buck is African-American.

In his habeas petition, Buck argued that Dr. Quijano's reliance on race as a statistical predictor of future dangerousness, and the prosecutor's reference to this testimony on cross-examination, invited the jury to consider his race as a predictor of future dangerousness. He also argues that his counsel rendered ineffective assistance by eliciting this race related testimony from Dr. Quijano, and that counsel was ineffective for failing to object when the prosecutor asked a question about this testimony during Quijano's cross examination.

Buck notes that the Texas Attorney General conceded error in several other cases involving similar testimony by the same witness. He contends that the Attorney General also stated that he would not assert procedural defenses to such claims in federal court, but asserted such a defense in this case.

Buck conceded that he did not raise these claims either in his direct appeal or in his original state habeas corpus application, though he did raise them in his successive state habeas application. The TCCA dismissed the successive petition as an abuse of the writ. This Court therefore had no choice but to find the claims procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

This Court also discussed whether Buck could avoid the procedural default by showing that he is "actually innocent of the death penalty," i.e., but for a constitutional error, he would not have been legally eligible for a sentence of death, *see Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). The penalty phase evidence showed that Buck had a history of domestic violence, including, threatening his ex-girlfriend with a gun, shot his own sister during the rampage that resulted in the murders of Gardner and Butler, murdered Gardner in front of her children, showed no remorse for the murders, and laughed when asked about the murders. The Court found that the evidence presented was sufficient for the jury to conclude that Buck posed a future danger and was therefore eligible for a sentence of death.

A. Rule 60(b)

Rule 60(b)(6) provides for relief from a judgment for "any . . . reason that justifies relief." This Court can consider the motion if it "attacks, not the substance of the federal court's resolution [of Buck's habeas corpus petition] on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545

U.S. 524, 532 (2005). Relief under Rule 60(b) is available only if the case presents "extraordinary circumstances." *Id.* at 536.

Generally speaking, a "change in decisional law after entry of judgment does not constitute extraordinary circumstances" and is not alone a ground for relief from a final judgment under Rule 60(b)(6). *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (internal quotation marks and citation omitted). *Adams* specifically rejected the argument that *Martinez*, standing alone, constitutes "extraordinary circumstances" justifying relief under Rule 60(b)(6). *Id.* at 320. Buck argues that his case does present extraordinary circumstances because of the nature of Quijano's testimony, the fact that the claims have never been addressed on the merits by a reviewing court due to procedural bars, and the Texas Attorney General's decision not to raise procedural defenses in cases that Buck claims are similar.

As previously addressed in this Court's memorandum and order denying Buck's petition, Quijano's testimony on direct examination in this case noted the fact that African-Americans and Latinos are over-represented in the penal system. On cross examination, Quijano answered "yes" when asked: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" 28 Tr. at 160. Buck challenged this testimony solicited on cross examination, but the Fifth Circuit has previously rejected his claim that

his case is similarly situated to the other cases in which Quijano testified.

> Citing a line of cases in which Texas has conceded error and waived procedural default after the *prosecution* had introduced Dr. Quijano as an expert witness during the penalty phase, Buck contends that notions of "intra-court comity" compel us to conclude that the State must also waive procedural default in the instant case. Buck's case, however, differs markedly from, e.g., *Saldano v. Roach*, [363 F.3d 545 (5th Cir. 2004),] in which the prosecution introduced Dr. Quijano as an expert witness and then proceeded to question him as to how the defendant's race might serve as a predictor of future dangerousness. In *Saldano*, the State conceded its error and waived any procedural bar that otherwise might have precluded our review of the defendant's claim on the merits. Here, in contrast, the State has not conceded any error or waived its procedural bar. Rather, the State has consistently maintained that it did not violate Buck's constitutional rights merely by questioning Buck's own witness — without objection from Buck — on the very same issues first discussed by that witness during direct examination by the defense, a classic example of the defense "opening the door" for the prosecutor to pursue the subject. Because Buck's characterization of "intra-court comity" finds no support in our precedent, we decline to

> apply here concessions made by the State in a different case with different facts. Such a broad expansion of a party's case-specific concession would not only contravene our precedent, but would also discourage the State from conceding error when it seeks to correct its own mistakes — both of which are clearly undesirable results.

Buck v. Thaler, 345 Fed. App'x 923, 929 (5th Cir. 2009) (footnotes omitted). The Fifth Circuit has found that Buck's case is different in critical respects from the cases in which Texas confessed error.

Finally, Buck's argument that this Court should grant relief because no court has yet reviewed the merits of his ineffective assistance of counsel claims is circular. Procedural bars prevent courts from reviewing claims on the merits. Buck's claim is procedurally defaulted. Therefore, the claim has not been reviewed on the merits. Buck suggests that the fact that the claims are defaulted should constitute extraordinary circumstances excusing the default. Other than citing *Martinez*, however, Buck has failed to demonstrate that this case presents extraordinary circumstances. While the introduction of any mention of race was ill-advised at best and repugnant at worst, it was, in this case, *de minimis*. As respondent points out, there were two references to race in Dr. Quijano's testimony. On direct examination, Quijano stated the indisputable fact that African-Americans and Latinos are over-represented in the criminal justice system. On cross examination, Dr. Quijano answered affirmatively when questioned about earlier findings he had made that being

black is one statistical factor he considered in reaching his conclusion. The prosecutor did not make any race-based argument in closing. Moreover, the State's confession of error in other cases does not create any legally enforceable rights, nor does equity demand that the confession of error be extended to Buck's case for the reasons stated by the Fifth Circuit and quoted above. Finally, the fact that his claims have not been reviewed on the merits is a result of the fact that they were procedurally defaulted. If that constituted "extraordinary circumstances," then the change in decisional law represented by *Martinez*, would, by itself, provide grounds for relief under Rule 60(b). As noted above, both the Supreme Court and the Fifth Circuit have held otherwise. *See Gonzalez*, 545 U.S. at 531-32; *Adams*, 679 F.3d at319 [sic].

B. Ineffective Assistance of Counsel

Assuming without finding that Buck has demonstrated that his case presented "extraordinary circumstances," he would not be entitled to relief on the merits of his claim. In *Martinez*, the Supreme Court carved out a narrow equitable exception to the rule that a federal habeas court cannot consider a procedurally defaulted claim of ineffective assistance of counsel.

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim . where appointed counsel in the initial-review collateral proceeding was

> ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Martinez v. Ryan, 132 S.Ct. 1309, 1318-19 (2012).

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

In the context of a capital sentencing proceeding, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, [466] U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine, possession of a controlled substance, and unlawfully carrying a weapon. 28 Tr. at 5-28, 239-43. The State also presented testimony from Buck's former girlfriend recounting acts of domestic violence, including one instance in which Buck threatened her with a gun. *Id.* at 31-40.

In addition to Buck's past history, the jury was aware of the horrific facts of Buck's murder of Gardner and Butler. These included Buck's attempt to murder his own sister, and his murder of Gardner in front of her two children. The jury also heard that Buck was laughing about the murders when he was arrested, and that he said about Gardner that "the bitch deserved what she got." *Id.* at 50-51.

Buck called several witnesses who knew him and testified that he was not violent. *See* 28 tr. at 77, 84-85, 96. He also called two expert witnesses: Dr. Quijano and Dr. Patrick Lawrence. Quijano was the former chief psychologist for TDCJ, *id.* at 101-02, and Lawrence was a

psychologist specializing in prediction of future criminal behavior, *id.* at 177, 182-85.

Buck's counsel offered testimony that Quijano was neutral, emphasizing his experience working for TDCJ, *id.* at 101-04, and eliciting the fact that Quijano had testified for both defendants and the State in the past. *Id.* at 104-05. Quijano offered his opinion that Buck was not a future danger. *Id.* at 115. He based his conclusion, in part, on "several statistical factors . . . including, but not limited to age, sex, race, social economics, history of violence, and history of substance abuse." *Buck v. Thaler*, 345 Fed. App'x at 925. Included in Quijano's testimony was his observation that African-Americans and Latinos are over-represented in the criminal justice system. 28 Tr. at 111.

Nevertheless, the Court finds that counsel's representation fell below an objective standard of reasonableness under the first prong of *Strickland*. *See Strickland*, 466 U.S. at 687-88. Buck's trial counsel called Dr. Quijano as a witness even though he knew that Dr. Quijano had previously testified on the direct correlation between race and future dangerousness. Additionally, Buck's counsel had received Dr. Quijano's expert report before trial clearly stating that Buck's race made him statistically more likely to be a future danger. *Buck v. Thaler*, __ U.S. __, 132 S. Ct. 32, 33 (2011). Despite the longstanding "'unceasing efforts' to eradicate racial prejudice from our criminal justice system," *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987), Buck's counsel called Dr. Quijano as a witness and relied on his expert report,

although counsel was fully aware of Dr. Quijano's inflammatory opinions about race. There was no strategic reason to do so because Buck's counsel offered a second expert at trial, Dr. Lawrence, who had no history of this kind of troubling race-based testimony. Testimony like that of Dr. Quijano lends credence to any potential latent racial prejudice held by the jury. *Cf. Guerra v. Collins*, 916 F. Supp. 620, 636 (S.D. Tex. 1995), *aff'd sub nom. Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996) (holding that a defendant is "entitled to have his punishment assessed by the jury based on consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he shared a characteristic."). Buck's counsel recklessly exposed his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests. His performance fell below an objective standard of reasonableness, and the Court therefore finds that trial counsel's performance was constitutionally deficient.

However, the Court finds that under the facts of this case, Buck cannot show that he was prejudiced by his counsel's constitutionally deficient action. In light of the aggravating evidence, particularly the facts of the crime and Buck's actions following the murders, it cannot be said that there is a reasonable probability that the outcome would have been different if Quijano had made no reference to race. Although counsel rendered deficient performance by calling Quijano as a witness, Buck suffered no *Strickland* prejudice as a result. Therefore, the Court finds that Petitioner has not established a claim of ineffective assistance of trial counsel on this issue.

Buck also contends that his counsel was ineffective for failing to object when the State asked Quijano a question about the issue of Buck's race. As the Fifth Circuit noted, Buck opened the door to this question. *See Buck v. Thaler*, 345 Fed. App'x at 930. Because Buck opened the door, any objection to the prosecutor's question would have been futile. "This Court has made clear that counsel is not required to make futile motions or objections." *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990). Counsel was not ineffective for failing to make a futile objection.

Assuming without deciding, however, that the prosecutor's question amounted to constitutional error, Buck cannot prove prejudice. As previously discussed, the evidence showed that Buck had a prior criminal history and was violent toward his ex-girlfriend. He committed a brutal double murder, killing one of the victims in front of her two young children, and shot his own sister in the chest. Under these facts, there is no reasonable probability that the outcome of the sentencing phase would have been different if counsel objected to the prosecutor's question.

C. Certificate of Appealability

Although Buck has not requested a certificate of appealability ("COA"), the court may nevertheless determine whether he is entitled to this relief in light of the court's rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate

of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997). A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253[(c)] is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where the district court dismisses the

> petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court concludes that Buck has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and that jurists of reason would not find it debatable whether this court is correct in its procedural determinations. Therefore, Buck is not entitled to a COA.

D. Conclusion

For the foregoing reasons, Buck's renewed motion for relief from the judgment (Inst. # 49) is denied.

III. Order

For the foregoing reasons, IT IS ORDERED THAT Buck's Motion For Relief From Judgment (Docket Entry 49) is **Denied;** and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue. SO ORDERED.

SIGNED at Houston, Texas, on this 29th day of August, 2014.

/s/ Vanessa Gilmore
VANESSA GILMORE
United States District Judge

OPINION OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (HOUSTON DIVISION) DENYING PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO FRCP 59(E), MARCH 11, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

H-04-3965

DUANE EDWARD BUCK,

Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE-CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

March 11, 2015, Decided
March 11, 2015, Filed

ORDER

Duane Edward Buck is a Texas death row inmate. On July 24, 2006, this Court denied his petition for a writ of habeas corpus. Among the claims denied were Buck's claims that he received ineffective assistance of counsel

when his counsel called as an expert witness Dr. Walter Quijano, who mentioned an issue relating to race during the penalty phase of Buck's trial. Buck further contended that counsel was ineffective for failing to object when the prosecutor asked Dr. Quijano a question raising a racial issue on cross-examination. This Court found that those claims were procedurally defaulted, and the Fifth Circuit denied Buck's request for a certificate of appealability. *See Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir., 2009).

In 2012, the Supreme Court issued its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim. In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Supreme Court held that *Martinez* is applicable to the Texas capital postconviction process. On January 7, 2014, Buck, relying on *Martinez* and *Trevino*, filed a motion for relief from the judgment of this Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure (Inst. # 49). This Court denied that motion on August 29, 2014.

On September 26, 2014, Buck filed a motion to alter or amend judgment (Inst. # 67). For the reasons stated below, the motion is denied.

A motion to alter or amend under Fed.R.Civ.P. 59(e) "must clearly establish either a manifest error of law or must present newly discovered evidence." *Schiller v. Physicians Resource Grp., Inc.*, 342 F.3d 563, 567 (5th Cir. 2003)(internal quotation marks omitted). "Relief under

Rule 59(e) is also appropriate where there has been an intervening change in controlling law." *Id.*

Buck contends that, in denying relief on his Rule 60 motion, this Court "improperly excluded from its consideration significant evidence...." Motion to Alter or Amend (Inst. # 67) at 2. This assertion misrepresents the Court's opinion, which carefully considered all of Buck's argument and the entire record in this case.

This Court based the denial on the Court's extensive knowledge and re-review of the record in this case and independent review of relevant case law. Based on the record and controlling law, the Court concluded that Buck was not entitled to relief. The specific reasons for the denial of Buck's Rule 60 motion are explained in detail in the 18 page order denying that motion.

Contrary to the assertions in Buck's motion, this Court specifically addressed Buck's arguments that his case presents "extraordinary circumstances" justifying relief, both in the text of the order denying his most recent Rule 60(b) motion, *See* August 29, 2014, Memorandum and Order (Inst. # 66) at 8-10, and by reference to other orders and opinions addressing these arguments, *see id.* at 8. Buck cites no new law in support of his argument and, aside from his wholly inaccurate assertion that this Court excluded evidence from its consideration, merely expresses his disagreement with the Court's analysis and conclusion. That disagreement does not demonstrate a manifest error of law, present newly discovered evidence, or rely on an intervening change in controlling law. It therefore does not provide grounds for relief.

This Court also found that, while Buck's counsel rendered deficient performance, Buck did not demonstrate that he was prejudiced by that deficient performance. Because of this, Buck failed to demonstrate that he presented a substantial underlying claim of ineffective assistance of counsel, and therefore could not overcome his procedural default under *Martinez*. Buck now argues that this Court's prejudice analysis was wrong.

Once again, Buck's argument boils down to mere disagreement with this Court's analysis. While Buck cites a few cases in which a court found that a defendant was prejudiced by counsel's deficient performance in a capital sentencing proceeding despite evidence of a heinous crime, he cannot dispute that this analysis must be highly fact-specific. As discussed in detail in this Court's prior order, while counsel was deficient for calling Dr. Walter Quijano as an expert witness, any harm caused by his objectionable testimony was *de minimis* in light of, among other things: 1) the extremely limited scope of that testimony; 2) the fact that the prosecution did not refer to the objectionable testimony in closing argument; 3) the facts of Buck's crime, including the fact that he murdered one of his victims in front of her young children as the victim begged for her life; and 4) Buck's lack of remorse. Once again, Buck's argument comes down to the fact that he disagrees with this Court's conclusion that counsel's deficient performance did not, in light of the entire record, raise a reasonable probability that the outcome of the sentencing hearing would have been different had counsel not called Dr. Quijano to testify. *See Strickland v. Washington*, 466 U.S. 668, 694-95 (1984). As discussed above, Buck's

disagreement with this Court's analysis does not provide a basis for relief under Rule 59.

Moreover, because this Court's finding that Buck is not entitled to relief is not debatable among jurists of reason, Buck is not entitled to a certificate of appealability from this Order. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). For the foregoing reasons,

IT IS ORDERED THAT Buck's Motion to Alter or Amend Judgment (Inst. # 67) is **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue. SO ORDERED.

SIGNED at Houston, Texas, on this 11th day of March, 2015.

/s/ Vanessa Gilmore
VANESSA GILMORE
United States District Judge

OPINION OF THE FIFTH CIRCUIT RE: PETITIONER'S MOTION FOR A CERTIFICATE OF APPEALABILITY, AUGUST 20, 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[COURT STAMP OMITTED]

No. 14-70030

DUANE EDWARD BUCK,

Petitioner—Appellant,

versus

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent—Appellee.

Appeals from the United States District Court
for the Southern District of Texas.
USDC No. 4:04-CV-3965.

Before SMITH, OWEN, and HAYNES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Duane Buck seeks a certificate of appealability ("COA") to challenge the denial of his motion for reconsideration, in which he sought to raise ineffective assistance of counsel ("IAC") in seeking federal habeas corpus relief. Because he has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6), we deny the application for a COA.

I.

This is Buck's third trip to the Fifth Circuit. More detailed explanations of the facts and procedural history can be found in *Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009) (per curiam), and *Buck v. Thaler*, 452 F. App'x 423 (5th Cir. 2011) (per curiam). We recite only what is relevant to this request for a COA.

In July 1995, Buck murdered his ex-girlfriend Debra Gardner and her friend Kenneth Butler. Buck was arrested at the scene, and police found the murder weapons in the trunk of his car. Two witnesses identified him as the shooter. Buck laughed during and after the arrest and stated to one officer that "[t]he bitch got what she deserved."

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Buck was convicted of capital murder for the deaths. During the penalty phase, the state presented evidence that Buck would likely remain dangerous. That evidence included his criminal history, his violent conduct, and his demeanor during and after the arrest.

Buck called Dr. Walter Quijano, a clinical psychologist, as an expert witness to testify regarding future dangerousness. Buck's lawyer asked Quijano what factors he would look at to determine whether an inmate would engage in future acts of violence. Quijano explained several, including age, sex, race, social economics, and substance abuse. For example, he testified that advanced age and increased wealth correlated with a decline in the likelihood of committing future violent acts. On race, he gave a one-sentence explanation: "It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." That matched a statement included in Quijano's expert report, which was introduced as evidence.

During cross-examination, the prosecution elicited one more comment on race from Quijano: Question: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" Answer: "Yes." During closing arguments, the prosecution referenced Quijano's testimony generally and specifically noted that he had said that, although Buck was in the low range for a probability of committing future violent acts, the probability did exist. The prosecution did not reference Buck's race or Quijano's use of race.

The jury unanimously found beyond a reasonable doubt that there was a probability Buck would commit criminal acts of violence that would be a continuing threat to society. It further found that there were not sufficient mitigating circumstances to justify a life sentence. The court sentenced Buck to death, and the Texas Court of Criminal Appeals ("TCCA") affirmed.

Buck filed his first state habeas application in 1997; it contained no IAC claim or any other challenge based on Quijano's testimony. In 2000, however, the Texas Attorney General ("AG") admitted to the Supreme Court in *Saldano v. Texas*, 530 U.S. 1212 (2000), that the state had erred in calling Quijano as a witness and having him testify that the defendant's race increased the likelihood of future dangerousness. Shortly after the Court vacated and remanded *Saldano* on that confession of error, the AG publicly identified eight other cases involving racial testimony by Quijano, six of which the AG said were similar to Saldano's case; one of those was Buck's. Buck contends that Texas "promised to concede constitutional error and waive its procedural defenses" in his case so that he could get resentenced without the race-related testimony.[1]

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1. It has never been established that the AG's office promised not to raise procedural defenses in Buck's case. The record contains a news release by the AG's office stating that a post-*Saldano* audit had revealed "eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial," of which six were similar to *Saldano*. The same release stated that the AG's office "sent letters to opposing counsel and to the local

In 2002, while his first state habeas petition was pending, Buck filed a second petition that challenged Quijano's testimony on several grounds, including IAC. The TCCA ultimately denied the first habeas petition and dismissed the second as an abuse of the writ.

In 2004, Buck filed a federal habeas petition raising a litany of challenges to his sentence, including IAC. The court denied relief on that claim because Buck had not raised IAC on direct appeal or in his original state habeas petition. He had raised it in his second state habeas petition, but the TCCA dismissed it as an abuse of the writ, so it was procedurally defaulted. Buck sought a COA from this court on only one issue: "Was he deprived of due process or equal protection by the prosecution's reference to testimony from Buck's own penalty-phase expert witness . . . ?" *Buck*, 345 F. App'x at 924. We concluded that the claim was procedurally barred and meritless. *Id.* at 930.

After the state set an execution date of September 15, 2011, Buck moved for relief from the earlier district-court judgment under Federal Rule of Civil Procedure 60(b)(6), claiming that the state's failure to admit error and waive defenses was extraordinary and merited relief. The motion also asked for relief under Rule 60(d)(3), alleging that the AG had committed fraud on the court.

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prosecutors involved advising them of [the AG's] investigation." But we have found no statement by the AG in the record in which he confessed error relating to Buck's case and promised not to raise procedural defenses.

The district court denied the motion and, three days later, Buck filed a motion to amend the judgment under Rule 59(e), claiming that the AG had made material misrepresentations and omissions in opposing the earlier motion for relief. The court denied that motion as well. We declined to permit a successive habeas petition or issue a COA. *Buck*, 452 F. App'x at 433.

The Supreme Court stayed Buck's execution to consider his petition for writ of certiorari. It ultimately denied the petition, accompanied by a statement respecting that denial and a dissent. *Buck v. Thaler*, 132 S. Ct. 32, 32-35 (2011) (Alito, J., respecting the denial of certiorari); *id.* at 35-38 (Sotomayor, J., dissenting from the denial of certiorari).

In 2013, Buck filed another state habeas petition. The trial court concluded that it was a subsequent petition and referred it to the TCCA. While that petition was pending, the Supreme Court decided *Trevino v. Thaler*, 133 S.

The record contains a *Houston Chronicle* article from 2000 that paraphrases the AG's spokesperson as saying, "If the attorneys amend their appeals currently pending in federal court to include objections to Quijano's testimony, the attorney general will not object." The spokesperson is quoted as representing that cases still with the district attorney's offices "will be handled in a similar manner as the Saldano case." A *New York Times* article went further, stating, "[The AG's] staff has notified defense lawyers representing the six inmates that his office will not object if they seek to overturn the death sentences based on Mr. Quijano's testimony." Because it does not change the outcome of this appeal, we need not explore whether such a promise was made or how explicit it was.

Ct. 1911 (2013), holding that Texas's procedural regime rendered it almost impossible to raise IAC claims on direct appeal, making the scheme similar to the one in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). The Court therefore held that the *Martinez* exception applied in Texas: The lack of effective counsel during initial state collateral-review proceedings could excuse a procedural default on an IAC claim. *Trevino*, 133 S. Ct. at 1921.

The TCCA dismissed the petition as an abuse of the writ. *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013). Three judges dissented, concluding that Buck had made out a potentially meritorious case of IAC relating to his attorney's alleged failure adequately to investigate and present mitigating evidence. *Id.* at 98-114 (Alcala, J., dissenting).

In January 2014, Buck again filed for Rule 60(b)(6) relief from judgment in his federal habeas case. He focused solely on his IAC claim, contending that counsel was ineffective for introducing Quijano and that his case was sufficiently extraordinary to justify relief under Rule 60(b)(6). The district court denied the motion, holding that Buck's case did not have the extraordinary circumstances required for Rule 60(b)(6). It also held that Buck had failed to make out an IAC claim, establishing deficient performance but not prejudice. Within a month of that denial, Buck again moved for relief under Rule 60(b)(6), essentially disagreeing with the district court's disposition of the issues. On March 11, 2015, the district court denied that motion as well and declined to issue a COA.

II.

To obtain a COA, Buck must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). On application for a COA, we engage in "an overview of the claims in the habeas petition and a general assessment of their merits" but do not engage in "a full consideration of the factual or legal bases adduced in support of the claims," asking only whether the district court's resolution of the claim "was debatable among jurists of reason." *Miller-El*, 537 U.S. at 322.

The district court denied the motion for a procedural reason, namely, Buck's failure to show extraordinary circumstances justifying relief under Rule 60(b)(6). We therefore must deny a COA if Buck fails to establish both (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" and (2) that those jurists "would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, [529] U.S. 473, 484 (2000).

III.

Regarding the procedural bar, for a Rule 60(b)(6) motion in this posture not to be itself a successive habeas petition, the litigant "must not be challenging a prior merits-based ruling." *Balentine v. Thaler*, 626 F.3d 842, 846 (5th Cir. 2010). Instead, he must be challenging a previous ruling—such as procedural default or a statute-of-limitations bar—that precluded a merits determination.

Id. at 846-47. The district court initially denied Buck's IAC claim because the TCCA's abuse-of-the-writ dismissal was an adequate and independent state ground for denying relief, so Buck's motion satisfies that requirement.

To obtain relief under Rule 60(b)(6), Buck must show "extraordinary circumstances," *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005), which "will rarely occur in the habeas context," *id.* at 535. There is little guidance as to what constitutes "extraordinary circumstances," but we have recognized that a change in a decisional law does not qualify, and we have cited with approval district-court decisions holding other circumstances not extraordinary as well, including IAC. *See Williams v. Thaler*, 602 F.3d 291, 312 (5th Cir. 2010).

Buck contends that eight equitable factors from *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. Unit A Jan. 1981), are the proper means for evaluating a Rule 60(b) motion in a habeas case.[2] We have declined to

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2. Those factors are "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether if the judgment was a default or a dismissal in which there was no consideration of the merits the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." *Seven Elves*, 635 F.2d at 402.

answer whether *Seven Elves* sets the standard for a Rule 60(b)(6) motion in habeas proceedings. *See Diaz v. Stephens*, 731 F.3d 370, 376-77 (5th Cir. 2013). We need not answer it now because Buck has not made out even a minimal showing that his case is exceptional.

The January 2014 motion contains eleven facts, reurged in the COA application, that Buck says make the case extraordinary:

1. Mr. Buck's trial attorney knowingly presented expert testimony to the sentencing jury that Mr. Buck's race made him more likely to be a future danger;

2. Although required to act as gate-keeper to prevent unreliable expert opinions from reaching and influencing a jury, see Tex. R. Evid. 705(c); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), the trial court qualified Dr. Quijano as an expert on predictions of future dangerousness, allowed him to present race based opinion testimony to Mr. Buck's capital sentencing jury, and admitted Dr. Quijano's excludable hearsay report linking race to dangerousness;

3. The trial prosecutor intentionally elicited Dr. Quijano's testimony that Mr. Buck's race made him more likely to be a future danger on cross-examination, vouched for him as an "expert" in closing, and asked the jury to rely on Dr. Quijano's testimony to answer the future dangerousness special issue in the State's favor;

4. Mr. Buck's state habeas counsel did not challenge trial counsel's introduction of this false and offensive testimony — or Texas's reliance on it — in Mr. Buck's initial state habeas application;

5. The Texas Attorney General conceded constitutional error in Mr. Buck's case and promised to ensure that he received a new sentencing, but reneged on that promise after deciding that the introduction of the offensive testimony was trial counsel's fault;

6. This Court ruled that federal review of Mr. Buck's trial counsel ineffectiveness claim was foreclosed by state habeas counsel's failure to raise and litigate the issue in Mr. Buck's initial state habeas petition, relying on *Coleman*, which has subsequently been modified by *Martinez* and *Trevino*;

7. The Fifth Circuit held Mr. Buck's trial counsel responsible for the introduction of Dr. Quijano's testimony linking Mr. Buck's race to his likelihood of future dangerousness;

8. Three Supreme Court Justices concluded that trial counsel was at fault for the introduction of Dr. Quijano's testimony;

9. Three Judges of the CCA found that "because [Mr. Buck's] initial habeas counsel failed to include any claims related to Quijano's testimony

> in his original [state habeas] application, no court, state or federal, has ever considered the merits of those claims," *Buck*, 2013 WL 6081001, at *5;
>
> 10. Mr. Buck's case is the only one in which Texas has broken its promise to waive procedural defenses and concede error, leaving Mr. Buck as the only individual in Texas facing execution without having been afforded a fair and unbiased sentencing hearing; and
>
> 11. Martinez and Trevino now allow for federal court review of "substantial" defaulted claims of trial counsel ineffectiveness.

Initial examination of those facts reveals that they are not extraordinary at all in the habeas context. Numbers 1-3, 7, and 8 are just variations on the merits of Buck's IAC claim, which is at least unremarkable as far as IAC claims go. Buck's IAC claim is not so different in kind or degree from other disagreements over trial strategy between lawyer and client that it counts as an exceptional case. Nor are IAC claims as a class extraordinary under Rule 60(b)(6). The Court warned in *Gonzalez*, 545 U.S. at 536, that extraordinary circumstances will rarely be present in the habeas context.

The fourth and ninth extraordinary facts merely point out that Buck's IAC claim was procedurally defaulted and did not get a merits determination. That is not an extraordinary circumstance in the habeas context; it is the nature of procedural defaults that many potentially

viable claims will never advance to a merits determination. No jurists of reason would expand the definition of "extraordinary" to reach all procedurally defaulted IAC claims.

The sixth and eleventh facts relate to Buck's notion that *Trevino* and *Martinez* changed the law regarding procedural defaults in IAC claims in a way that could have excused his procedural default. *Martinez*, however, "was simply a change in decisional law" that is not an extraordinary circumstance under Rule 60(b)(6), and "*Trevino*'s recent application of *Martinez* to Texas cases does not change that conclusion in any way." *Diaz*, 731 F.3d at 376 (internal quotation marks omitted).

Those facts plainly fail to make even a plausible argument that Buck's is the extraordinary case that satisfies Rule 60(b)(6). He has repeatedly asserted, however, that his case is special because of the *Saldano*-related statements by the AG. Buck contends the AG conceded that Quijano's testimony was unconstitutional but reneged on a promise to resentence Buck (fact five), despite Texas's following through in other cases involving Quijano (fact ten).

Even if the AG initially indicated to Buck that he would be resentenced—a fact that has never been adequately established, *see* note 1, *supra*—his decision not to follow through is not extraordinary. The broken-promise element to this case makes it odd and factually unusual, but extraordinary circumstances are not merely found on the spectrum of common circumstances to unique circumstances. And they must be extraordinary circumstances "justifying relief from the judgment."

Gonzalez, 545 U.S. at 537. Buck has not shown why the alleged reneging would justify relief from the judgment. For example, he has not shown that he relied on the alleged promise to his detriment.

Nor is it extraordinary that the AG confessed error and waived procedural bars in other cases and not in Buck's. We have previously rejected the notion that some concept of "intra-court comity" requires the state to waive procedural defenses in similar cases. *See Buck*, 345 F. App'x at 929. Even assuming *arguendo* that the other cases at issue are materially similar to Buck's (which the state disputes), it can hardly be extraordinary that the state chose different litigation strategies between the two cases. Jurists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief.

Buck has not demonstrated that jurists of reason would debate whether his case is exceptional under Rule 60(b)(6). The request for a COA is DENIED.

[CERTIFICATION AND SEAL OMITTED]

OPINION OF THE FIFTH CIRCUIT EN BANC RE: PETITIONER'S MOTION FOR A CERTIFICATE OF APPEALABILITY, NOVEMBER 6, 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[COURT STAMP OMITTED]

No. 14-70030

DUANE EDWARD BUCK,

Petitioner—Appellant,

versus

WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent—Appellee.

Appeals from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING EN BANC
(Opinion August 20, 2015, U.S. App. LEXIS 14755)

Before SMITH, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 2 judges voted in favor of rehearing (Judges Dennis and Graves), and 13 judges voted against rehearing (Chief Judge Stewart and Judges Jolly, Davis, Jones, Smith, Clement, Prado, Owen, Elrod, Southwick, Haynes, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

JAMES L. DENNIS, Circuit Judge, with whom GRAVES, Circuit Judge, joins, dissenting:

In *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003), the Supreme Court held that the threshold inquiry required by 28 U.S.C. § 2253(c):

> does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

In my view, the panel in this case, perhaps unintentionally, followed that prohibited side-stepping process by justifying its denial of a COA based on its adjudication of the actual merits. This is not the first time that a panel of this court has flouted *Miller-El*'s clear command when denying a COA: our court's "troubling" habit of evaluating the merits of petitioners' claims has been noted by three Supreme Court justices. *See Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). Because I believe that Buck has made the requisite threshold showing of entitlement to relief, I respectfully dissent from the refusal to rehear his case en banc.

Duane Buck, a capital prisoner, seeks to raise ineffective assistance of counsel in federal habeas corpus

proceedings. His habeas petition was denied by the district court as procedurally barred. Buck has now applied to this court for a COA to challenge the district court's denial of his second motion for relief from judgment under Rule 60 of the Federal Rules of Civil Procedure, in which he alleged that extraordinary circumstances warrant reopening the proceedings. Under *Slack v. McDaniel*, [529] U.S. 473, 484 (2000), a COA should issue in Buck's case if he shows (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" and (2) that those jurists "would find it debatable whether the district court was correct in its procedural ruling." Yet the panel denied Buck's application on the grounds that "he has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6)." *Buck v. Stephens*, Slip Op. at 1 (Aug. 20, 2015). By ruling on the merits, the panel contravened the Supreme Court's clear commands and improperly denied Buck his right to appeal.

In *Miller-El*, the Supreme Court reiterated that, when evaluating a COA application, "the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." 537 U.S. at 326. A petitioner is not required to demonstrate that he is entitled to relief; in fact, "[i]t is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* at 337. Rather, a petitioner satisfies the *Slack* standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (emphasis added). Furthermore, under this court's established precedent, "any doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin v. Dretke*,

434 F.3d 782, 787 (5th Cir. 2005) (citing *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004) (per curiam); *Newton v. Dretke*, 371 F.3d 250, 254 (5th Cir. 2004)).

In his application, Buck presented eleven factors that, when considered together, he believes demonstrate that his case involved extraordinary circumstances. Rather than consider whether reasonable jurists could disagree with the district court and conclude that Buck's allegations "set up an extraordinary situation," *Ackermann v. United States*, 340 U.S. 193, 199 (1950), the panel went through the factors one by one and determined that each was "not extraordinary." *Buck*, Slip Op. at 9-10. At the end of this flawed analysis of the merits of Buck's claims, the panel conclusorily declared: "Jurists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief." *Id.* at 10. This analysis would not be sufficient even if the court were properly considering the merits of Buck's claims: like the "dismissive and strained interpretation" of a petitioner's evidence that was rejected by the Supreme Court first in *Miller-El*, 537 U.S. at 344, and then again in *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005), the panel "dismisses, miscasts, and minimizes [Buck's] evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone,"[1] proves extraordinary circumstances. This mischaracterization is still more deficient at this stage in the proceedings, where it is employed to aid the panel in "deciding [Buck's] appeal without jurisdiction." *Miller-El*, 537 U.S. at 326-27.

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1. Brief of the NAACP LDF, et al., as *Amici Curiae* at 3, *Miller-El v. Dretke*, 545 U.S. 231 (No. 03-9659) 2004 WL 1942171, at *3.

"[P]roving his claim was not [Buck's] burden." *Jordan*, 135 S. Ct. at 2652. A proper, threshold inquiry into Buck's claim would have revealed that reasonable jurists could disagree with the district court's conclusions. Buck asserts that he faces execution based on a capital sentencing proceeding whose reliability was fundamentally compromised by the race-based testimony of Dr. Walter Quijano. He asserts that the State of Texas identified his case as one of six that was "similar" to that of Victor Hugo Saldaño, in which the State admitted that Dr. Quijano's testimony and the resulting "infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's] constitutional right to be sentenced without regard to the color of his skin." State's Resp. to Pet. for Cert, at 8, *Saldano v. Texas*, U.S. Supreme Court, No. 99-8119. He asserts that his is the only death sentence identified by the State that has not been overturned because his is the only case in which Dr. Quijano's participation in the trial was the result of the deficient performance of his own defense attorney. He asserts that the procedural default that barred his present claim should have been waived by the State pursuant to representations made by the Texas Attorney General. He asserts that, following the Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the same procedural default would not bar his claim if it were brought in federal court for the first time today. And he asserts that three judges on the Texas Court of Criminal Appeals dissented from the dismissal of his state habeas petition as procedurally barred, concluding that "[t]he record in this case reveals a chronicle of inadequate representation at every stage of the proceedings, the integrity of which is further called into question by the admission of racist and inflammatory testimony from an expert witness at the punishment phase" and that the procedural barrier should

therefore be abrogated. *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013) (Alcala, J., dissenting), *cert. denied sub nom. Buck v. Texas*, 134 S. Ct. 2663 (2014). While each of these factors might, on its own, be insufficient to warrant relief, together they describe a situation that is at least debatably "extraordinary."

That the issue is at least debatable is further illustrated by Justice Sotomayor's dissent from the denial of certiorari in *Buck v. Thaler*, 452 F App'x 423 (5th Cir. 2011), a previous iteration of this case. Justice Sotomayor—joined by Justice Kagan—concluded that, "[e]specially in light of the capital nature of this case and the express recognition by a Texas attorney general that the relevant testimony was inappropriately race-charged, Buck has presented issues that 'deserve encouragement to proceed further'" and a COA should therefore have been granted. *Buck v. Thaler*, 132 S. Ct. 32, 38 (2011) (quoting *Miller-El*, 537 U.S. at 327).

"Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination." *Newton*, 371 F.3d at 254 (5th Cir. 2004). In a case involving the severest of penalties, the panel's summary conclusion that "[j]urists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief" was both inappropriate and incorrect.

I respectfully dissent.

SALDAÑO V. TEXAS: RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, NO 99-8119

No. 99-8119

IN THE
SUPREME COURT OF THE UNITED STATES

VICTOR HUGO SALDANO,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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[TABLES INTENTIONALLY OMITTED]

No. 99-8119

IN THE
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VICTOR HUGO SALDANO,

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**RESPONSE TO PETITION
FOR WRIT OF CERTIORARI**

Respondent, the State of Texas, files this response to Victor Hugo Saldano's petition for writ of certiorari and agrees that, under the record in this case, the prosecution's introduction of race during the penalty phase as a factor for determining "future dangerousness" constituted a

violation of Saldano's rights to equal protection and due process. Accordingly, Texas asks the Court to grant the petition, vacate the trial court's imposition of sentence on Saldano, and remand the case to the trial court with instructions that Saldano receive a new sentencing hearing in which race is not considered.[1]

STATEMENT OF THE CASE

I. Saldano's Crime

In 1996, the Petitioner, Victor Hugo Saldano, was convicted of capital murder in Collin County, Texas, for the murder of Paul Green.[2] The evidence presented at trial showed that Saldano and an accomplice used a handgun to kidnap Mr. Green, a forty-six year old man, from a grocery store parking lot.[3] The kidnaping occurred at 10:00 on a Saturday morning in the presence of witnesses.[4] Neither Saldano nor his accomplice knew Mr. Green, and the crime appears to have been random.[5]

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1. The jury's finding of Saldano's guilt is neither raised nor affected by this petition.

2. Pet. App. at 1.

3. Pet. App. at 7.

4. Pet. App. at 7.

5. 21 SF at 280. (Under the former Texas Rules in effect at the time of Saldano's trial, the "Statement of Facts" was the name used for the court reporter's recording of testimony which is more commonly known as the "transcript." Reference to the multi-volume Statement of Facts will be made as "_ SF at _".)

Mr. Green was forced into his car by Saldano, and while a gun was held to his head by the accomplice, Mr. Green was taken to a secluded spot on a country road.[6] Saldano forced Mr. Green into the woods while the accomplice waited at the car.[7] Once in the woods, Saldano fatally shot Mr. Green five times, including once in the head at point-blank range.[8] Saldano stole Mr. Green's wallet and watch.[9]

Saldano and his accomplice drove Mr. Green's car back toward town before abandoning it on the side of the highway.[10] A short time thereafter, Saldano and his accomplice were taken into custody.[11] Prior to his trial, Saldano told the jailer that he had shot Mr. Green four times, and then once in the head just to make sure he was dead.[12] Saldano said he felt nothing when he shot Mr. Green.[13]

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6. Pet. App. at 7.

7. Pet. App. at 7.

8. Pet. App. at 7; 14 SF at 233.

9. Pet. App. at 7.

10. Pet. App. at 8.

11. Pet. App. at 8.

12. Pet. App. at 8.

13. Pet. App. at 9.

II. The Admittance of Race as a Factor in Determining Future Dangerousness

In the penalty phase of Saldano's trial, the jury was charged with answering two questions regarding Saldano.[14] First, the jury was charged with finding beyond a reasonable doubt the probability that Saldano would commit criminal acts of violence that would constitute a continuing threat to society.[15] The jury was instructed that the burden of proving this "future dangerousness" lay solely on the prosecution.[16] Second, if the jury answered yes to the first question, the jury was instructed to answer whether, considering all of the evidence, including the circumstances of the offense, Saldano's character and background, and Saldano's personal moral culpability, there was a sufficient mitigating circumstance or circumstances to warrant the imposition of a life sentence rather than the death sentence.[17]

The jury was presented with more than enough evidence to warrant its finding of "future dangerousness." In fact, the Texas Court of Criminal Appeals previously ruled that there was, without reference to any testimony

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14. TR at 125. (Under the former Texas Rules in effect at the time of Saldano's trial, the "Transcript" was the name used for all pleadings and other court documents upon which the trial occurred. Reference to the transcript will be made as "TR at _".)

15. TR at 125.

16. TR at 120.

17. TR at 126.

elicited about race, sufficient evidence to warrant the finding of "future dangerousness," and Saldano does not seek review of that decision here.[18] This evidences includes the facts that: (1) the circumstances of Saldano's capital offense demonstrate that it was particularly random, callous, cruel, and bold; (2) Saldano expressed no remorse for the slaying of his victim and has even stated that he felt nothing at the time of the killing; (3) Saldano was engaged in an escalating series of criminal activities prior to the killing of his victim; and (4) Saldano's relatively young age.[19]

During the sentencing phase of Saldano's trial, the prosecution presented testimony on the issue of Saldano's future dangerousness,[20] including evidence that there were twenty-four factors to be weighed in determining future dangerousness, one of which was Saldano's race.[21] The witness testified that African-Americans and Hispanics are over-represented in prison compared to their percentage of the general population.[22] He explained that "race itself may not explain the over-representation, so there are other subrealities that may have to be considered."[23] Further, the witness testified

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18. Pet App. at 6-9.

19. Pet. App. at 6-9.

20. Pet. App. at 8; 20 SF at 62.

21. Pet. App. at 9-10.

22. Pet. App. at 9.

23. 20 SF at 76.

that because Saldano was from Argentina, he would be considered Hispanic.[24] As the Texas Court of Criminal Appeals recognized, the prosecution's witness "testified that because [Saldano] is Hispanic, this was a factor weighing in the favor of future dangerousness."[25] At the conclusion of the witness's direct testimony, the State admitted into evidence a series of exhibits consisting of flip-charts that listed each of the factors the jury was to weigh in determining future dangerousness.[26] The charts had marks next to each factor that was said to apply to Saldano, including race.[27]

Counsel for Saldano did not object to the introduction of testimony regarding race. Instead, defense counsel cross-examined regarding the reliability of the data and whether Saldano, as a Argentinian, fit within the category of Hispanic.[28] The witness did not have evidence of the studies with him, and they are not part of the record.[29]

On cross-examination, the witness further stated that he could not tell the jury how to weigh the factors he outlined, stating that they may all be of equal value, but

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24. 20 SF at 76.

25. Pet. App. at 9.

26. 20 SF at 108-09; 22 SF at Exhibits 116-18 (Attached as Tab A.)

27. *See* Tab A.

28. 20 SF at 114-31.

29. 20 SF at 115.

it was for the jury to decide while considering all of the factors.[30] Saldano's expert testified that the racial studies relied upon by the prosecution's witness only demonstrated a correlation between race and recidivism, and could not tell the jury anything about actual causation.[31] In fact, Saldano's expert testified that parts of the method were valid, but that they showed merely "some relationship here" and not "causation."[32]

While not mentioning race specifically, in closing argument the prosecution told the jury to rely on the twenty-four factors provided by its witness. The jury was told to take the formula of twenty-four factors and "plug it in."[33] The jury found that Saldano was a future danger to society and that there were not sufficient mitigating factors to warrant life imprisonment.[34] Accordingly, the trial court sentenced Saldano to the death penalty.[35]

In Saldano's direct appeal to the Texas Court of Criminal Appeals, he asserted numerous claimed errors, including the use of race as a factor in determining future dangerousness. In upholding the sentence, the court recognized that the prosecution's witness testified that

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30. 20 SF at 132-34, 153.

31. 20 SF at 187-88.

32. 20 SF at 188.

33. 21 SF at 303.

34. 21 SF at 307-08.

35. 21 SF at 309.

because Saldano was Hispanic, this was a factor weighing in favor of future dangerousness.[36] In a 6-2 vote, the court held that any claimed error was waived because there had been no objection to the testimony and it did not rise to the level of fundamental error.[37] Writing in concurrence, one judge indicated that, while the danger of presenting the jury with such racially charged testimony was real and should not be sanctioned, he believed the evidence did not harm Saldano.[38]

ARGUMENT

The sole issue raised by Saldano is whether the Texas Court of Criminal Appeals erred in upholding his death sentence, despite the improper introduction of testimony inviting the use of race as a factor in determining future dangerousness, due to his counsel's failure to object. Because the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process, Texas confesses error and agrees that Saldano is entitled to a new sentencing hearing. *See Zant v. Stephens*, 462 U.S. 862, 886 (1983).

The Court has previously upheld the consideration of "future dangerousness" in the penalty phase of a capital trial. *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994). In fact, the Court has recognized that "a

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36. Pet. App. at 9.

37. Pet. App. at 10.

38. Pet. App. at 11.

defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." *Id.* However, the Court has held, in dicta, that race cannot be an aggravating factor in determining the death penalty. *Zant,* 462 U.S., at 886. Other courts have made similar observations. *California v. Bacigulupo,* 862 P.2d 808, 820 (Cal. 1993); *Horton v. Georgia,* 295 S.E.2d 281, 285 (Ga. 1982).

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell,* 442 U.S. 545, 555 (1979). A defendant is "entitled to have his punishment assessed by a jury based upon consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he share[s] a characteristic." *Guerra v. Collins,* 916 F.Supp. 620, 630 (S.D. Tex. 1995), *aff'd,* 90 F.3d 1075 (CA5 1996).

The Court has recognized the harm associated with the introduction of race into the criminal justice system. In *McCleskey v. Kemp,* the Court explained:

> Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury ... is a vital principle, underlying the whole administration of criminal justice."

> Thus, it is the jury that is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."

481 U.S. 279, 309-10 (1987) (citations omitted). Despite the fact that sufficient proper evidence was submitted to the jury to justify the finding of Saldano's future dangerousness, the infusion of race as a factor for the jury to weigh in making its determination violated his constitutional right to be sentenced without regard to the color of his skin.

It is appropriate for the Court to grant certiorari, vacate the judgment below, and remand the case (GVR) when such resolution is supported by the equities of the case. *Lawrence v. Charter*, 516 U.S. 163, 167-68 (1996). The Court has broad power to GVR. *Id.* at 166. When the government confesses error in the judgment below, the Court may vacate the judgment and remand the case to the trial court for further proceedings. *See,* e.g., *Fogel v. United States*, 335 U.S. 865 (1948); *Shelton v. United States*, 346 U.S. 270, 270 (1953). Further, in cases such as this, when it appears that a confession of error reveals a genuine and potentially determinative error by the court below, a GVR is appropriate. *Lawrence,* 516 U.S., at 172.

CONCLUSION

For the reasons stated, Texas respectfully requests that the Court grant the petition, vacate the trial court's imposition of sentence on Saldano, and remand the case to the trial court with instructions that Saldano receive a new sentencing hearing in which race is not considered.

Respectfully submitted,

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